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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1933.

MISSISSIPPI VALLEY BARGE LINE COMPANY, a Corporation,
Appellant (Petitioner),

vs.

THE UNITED STATES OF AMERICA and THE INTERSTATE COMMERCE COMMISSION,
Appellees (Defendants),

and

ILLINOIS CENTRAL RAILROAD COMPANY, LOUISVILLE AND NASHVILLE RAILROAD COMPANY, SOUTHERN RAILWAY COMPANY, CINCINNATI, NEW ORLEANS AND TEXAS PACIFIC RAILWAY COMPANY, THE ALABAMA GREAT SOUTHERN RAILROAD COMPANY and NEW ORLEANS AND NORTHEASTERN RAILROAD COMPANY,
Appellees (Interveners).

No. 807.

Appeal from the District Court of the United States for Eastern Division of Eastern Judicial District of Missouri.

BRIEF OF APPELLANT.

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Appeal from the District Court of the United States for Eastern Division of Eastern Judicial District of Missouri.

BRIEF OF APPELLANT.

REFERENCE TO OPINIONS BELOW.

The decision and orders of the Interstate Commerce Commission brought in issue in this proceeding are its Investigation and Suspension Docket (I. & S.) 3814, 195 I. C. C. 127.

This is an appeal from a final decree of a three-judge court, Honorable John B. Sanborn, Circuit Judge; Honorable Charles B. Faris, District Judge, and Honorable Charles B. Davis, District Judge, and is now reported in 4 F. Supp. 745.

STATEMENT OF THE CASE.

THE FACTS UNDER WHICH THIS LITIGATION ARISES.

The Mississippi Valley Barge Line Company is a Delaware corporation, owning and operating a barge line from New Orleans to ports Cincinnati, Ohio, and St. Louis, Missouri, and intermediate ports upon the Ohio and Mississippi Rivers, and having an investment in towboats, barges, erected and leased terminals in the total sum of $3,498,693.11.

Said corporation, in conformity with law and as a common carrier of freight under its charter, applied to the Interstate Commerce Commission for a certificate of convenience and necessity, Ex parte 99, 167 I. C. C. 41 (R. 137), and after public hearing said Commission, on July 11, 1930, issued a certificate of public convenience and necessity to this appellant and in said order stated:

> "We find that the present and future public convenience and necessity require the operation of Mississippi Valley Barge Line Company as a common carrier by water upon the Mississippi and Ohio Rivers between Cincinnati and New Orleans."

Thereafter, upon supplemental application, the Interstate Commerce Commission issued a further order (R. 137), in which it found that the present and future public convenience and necessity required the operation of Mississippi Valley Barge Line Company as a common carrier on the Mississippi River between New Orleans and St. Louis and intermediate points (182 I. C. C. 512).

This appellant, since October, 1930, has operated as a common carrier of interstate traffic over and along the Ohio and Mississippi Rivers upon regular schedules and with dependable service.

In 1932 the Southern carriers, including the intervening railways, through their executives and by concerted action, authorized their publishing agent, Mr. Emerson, to prepare, publish and file with the Interstate Commerce Commission certain tariffs, to wit, I. C. C. 156 and I. C. C. 165, which would effect radical reductions in rail rates on refined sugar, carload, minimums of 60,000 and 80,000 pounds, from Gulf ports Mobile, Alabama; New Orleans and Port Chalmette, Louisiana, and Pensacola, Florida, to certain destinations in the States of Illinois, Indiana, Kentucky, Iowa, Missouri, Ohio, Tennessee and Wisconsin (R. 130, 131). These tariffs so prepared and presented to the Interstate Commerce Commission would have become effective upon thirty days notice to the Commission and to the public (Sec. 6 [3], Interstate Commerce Act), to wit, on October 1, 1932, except that said rates were protested by various interested parties, including this appellant

(R. 131). The Interstate Commerce Commission, in response to said protests, suspended the effective date of said rates, entered its order of investigation under Investigation and Suspension Docket 3814, and designated said docket "Sugar Rates From the Gulf Ports" (R. 19). Hearings were had, the cause was briefed and argued before the Commission by various interested parties (R. 20, 21), and the Commission entered its report and original order July 3, 1933, and released same under date of July 7, 1933 (R. 131). In said order it was provided:

> "* * * that the Commission has, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof" (R. 64).

In said order of July 3, 1933, the Commission found justified the proposed rates of rail lines presented by Emerson's Supplement No. 54 to Tariff No. 1-4, I. C. C. 156, and Supplement No. 48 to Tariff No. 10-B, I. C. C. 165, upon the 60,000-pound minimum. The Commission found that the proposed rates contained in said tariffs on the 80,000-pound minimum were not justified and ordered said schedule of rates to be canceled, but authorized rates 4 cents per 100 pounds higher than proposed by the rail lines (R. 30).

In order that the Court may have the exact situation, the following tabulation sets forth the matters above detailed and gives the former rail rate, the rates proposed under

the new tariffs, and the rates authorized by the Commission. In this tabulation we have used the rate on 80,000-pound minimum as, under the record in this case, this is the rate that will carry by far the greater portion of the tonnage, and have used New Orleans as an origin point and Chicago and St. Louis as typical destinations because, under the Commission's decision, these particular destinations are recognized as the primary market for sugar:

From	To	Former Rate	Proposed Rate	Rate Authorized by the Commission
New Orleans	Chicago	56 cents	30 cents	34 cents
	St. Louis	52 cents	28 cents	32 cents

In its order of July 3, 1933, the Commission permitted the rail lines to put into effect upon one day's notice the rates approved or authorized therein. By an amended order released on July 18. 1933, the Commission, with respect to the rates approved on the 60,000-pound minimum, permitted the rail lines to make said rates effective July 29, 1933, upon five days notice. With respect to the rates designated upon the 80,000-pound minimum the Commission authorized the rail lines to make effective

> "* * * the rates approved in the report referred to and made a part hereof upon notice to this Commission and to the general public by not less than five days filing and posting in the manner prescribed in Section 5 of the Interstate Commerce Act, but not earlier than July 29, 1933" (R. 67, 68).

Appellant, under date of July 25, 1933, forwarded to the Interstate Commerce Commission a motion for rehearing and/or reargument in said cause (R. 143), and in its motion alleged changed conditions since the making of the record in the proceeding. This motion was denied by the Commission on August 3, 1933 (R. 143).

On July 26, 1933, the appellant, contemplating a suit to set aside the orders of the Commission, requested the Commission to postpone the effective date of the new rates so that a three-judge court could be convened and give consideration to an interlocutory order (R. 142). This request was denied on the same day (R. 142).

The present suit was filed by the Mississippi Valley Barge Line Company as petitioner in the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri (R. 1) (Act of Congress June 18, 1910, c. 309, Sec. 1, 36 Stat. 539, as amended March 3, 1911, c. 231, 207, 36 Stat. 1148, and October 22, 1913, Chap. 32, 38 Stat. 219; U. S. Code, Title 28, Par. 41 [28]). As instituted, the United States of America and Interstate Commerce Commission were the only defendants (Act of Cong. June 18, 1910, c. 309, Sec. 3, 36 Stat. 542, as amended March 3, 1911, c. 231, Sec. 208, 36 Stat. 1149; U. S. Code, Title 28, Par. 46).

The original bill set forth the matters hereinafter specifically detailed, and after the denial of appellant's motion addressed to the Interstate Commerce Commission for reargument and/or rehearing, an amended bill was prepared

and by leave of Court filed (R. 1-19), and, in addition to the matters contained in the original bill, set forth that said motion alleged changed conditions which had obtained since the making of the record in I. & S. 3814, and that a denial by the Commission of said motion was a denial of a right guaranteed to this appellant.

On August 15, 1933, a three-judge court was formed and convened at St. Paul, Minnesota, under proper application and notice, and at said time the United States of America and the Interstate Commerce Commission, by attorneys, appeared and filed answers (R. 68-80). At this time the rail lines, designated in the caption as interveners, entered their voluntary appearance in said cause under federal statute (Act of Cong. June 18, 1910, c. 309, Sec. 5, 36 Stat. 543, as amended; U. S. Code, Title 28, Sec. 45-A) and filed their answer (R. 81-92). Thereupon appellant, by leave of Court first had, filed a supplemental petition (R. 92, 93), wherein appellant prayed that interveners, having submitted themselves to the jurisdiction of the Court, be enjoined from assessing, collecting or charging the rates on sugar authorized in the Commission's report and orders.

THE INTERSTATE COMMERCE COMMISSION'S REPORT AND ORDERS.

The Commission in its report (decision) (R. 19, 35-50) specifically found:

That the proceedings involved a "contest among railroad, water and motor truck carriers for that great volume

of carload sugar traffic which moves from * * * Louisiana cane sugar refining points * * * to Central territory and certain Middle-Western points, and particularly to Chicago, Illinois, the country's largest market" (R. 21).

That "rail carriers * * * are here seeking * * * drastic, sweeping and quick reductions in rates. They are doing so with the hope of retrieving their losses of traffic and increasing their revenues to at least some extent. If the proposed reductions do not have the desired result and revenues from sugar go still lower, the rail carriers expect to console themselves with the thought that the present rates, if continued, would cause them even greater losses. In other words, they are willing to make these reductions rather than run the risk of the further losses which continued maintenance of the existing rate might entail. * * * They may consider even lower rates if those proposed are established and do not prove sufficiently effective" (R. 22).

That the all-rail rate at the time of the hearing from New Orleans to Chicago on this traffic was 56 cents per 100 pounds for a distance of 912 miles; that the proposed rate for all-rail lines on 80,000-pound minimum is 30 cents per 100 pounds (R. 38).

That "the lower rates would be used on most all the traffic" (R. 38).

That "no reductions are proposed in the standard barge or barge-rail rates from Louisiana points to the destinations considered * * *" (R. 38).

That the proposed 30-cent rate to Chicago is "blanketed back over direct routes almost as far south as St. Louis and over indirect routes via Louisville and Cincinnati almost into Tennessee * * * the 28-cent rate to St. Louis * * * is blanketed back into Kentucky and Tennessee * * * until it meets the present existing lower rates in points in Western Tennessee and Northern Mississippi, Alabama and Georgia" (R. 39).

That "the proposed rate of 30 cents from the New Orleans district to Chicago represents a 26-cent reduction in the present rate of 56 cents" (R. 39).

That "from the New Orleans district to St. Louis the proposed rate is 28 cents, 2 cents below that proposed to Chicago. It represents a reduction of 24 cents, the present rate being 52 cents. The standard barge line rate from the New Orleans district to St. Louis was 42 cents, except that the Mississippi Valley Barge Line Company maintained a rate of 37 cents. This rate was established in anticipation of an announced contemplated reduction of 4.5 cents in the all-rail rate from Louisiana points to St. Louis * * *" (R. 39).

That "the traffic manager of one of the principal refineries suggested 6 cents as a proper differential for the standard barge lines under the all-rail rate" (R. 40, 41).

That "the proposed rate from the New Orleans district to Cincinnati and Louisville is 30 cents, the same as to Chicago, and that proposed to Evansville and Cairo 28 cents, the same as to St. Louis. As was stated in connec-

tion with the previously considered case, the standard barge rates, in 1932, inclusive of loading, unloading, and marine insurance, were 44 cents to Cincinnati and Louisville, 42 cents to Evansville, and 39 cents to Cairo" (R. 41).

That "the proposed rates to the water competitive points, as applied also to the interior points in the intermediate territory, are generally lower than the water-truck combinations" (R. 42).

That "the usual water-truck rates to interior points north and south of the Ohio River are probably from 5 to 15 cents higher than the proposed all-rail rates of 28 and 30 cents" (R. 42).

That "the proposed rates as applied to the interior points alone would probably bring respondents [rail lines] a heavy traffic, would stop a large part of the distribution of water-borne sugar, and dry up much of the water movement" (R. 42, 43).

That "one of the main questions in this connection is whether respondents [rail lines] should be allowed to establish a rate to a water competitive point, Chicago, for instance, made solely with regard to water competition at that point, and then blanket it to the interior" (R. 43).

That "in 1932 the standard barge lines, generally with the 42-cent rate to St. Louis, took about nine-tenths of the sugar that moved northbound from Louisiana, notwithstanding the much lower rates of the contract barge operators. They handled about as much in 1932 as in 1931.

The slow, sporadic and uncertain service of the contract barges is unsatisfactory to some shippers. It is used only to supplement other transportation. Instances are cited in which contract-barge tows took six to seven weeks to reach St. Louis. At times the Mississippi River north of Cairo is difficult to navigate with low-powered towboats used in connection with the contract barges, because of swift current. The standard barge lines generally make the trip in two weeks" (R. 44).

That "the Federal barge line is even more of a sugar carrier, sugar constituting about 50 per cent of its northbound traffic * * * if the differential is substantially reduced the standard barge line will get less sugar and lower rates on such of it as they do handle. * * * Barge rates, made on the 80 per cent basis, if applied to the tonnage moved by the Federal barge line in 1931 would have cost that carrier about $350,000 and wiped out its showing of net revenue. If applied to the reduced volume that it would probably have received under a differential of about 5 cents they would have cost it much more" (R. 46).

That "if respondents succeed the barge lines will be dealt a staggering blow" (R. 46).

That "although sugar traffic in its present volume is almost vital to the existence of the barge lines, it would constitute but a small part of the traffic of the respondents. For the four-year period from 1928 to 1931, inclusive, the ratio of sugar tonnage to total tonnage averaged 1.4 per cent for the Illinois Central, 0.2 per cent for the Louisville

and Nashville Railroad Company, and 0.5 per cent for the Southern Railway Company" (R. 46).

That "if the schedules were approved, the rate from New Orleans to Terre Haute, Indiana, for instance, would be reduced from 56 cents to 30 cents, while to Paris, Illinois, a nearby point on Eastern lines, a rate of 56 cents would remain. Protestant urges that such disparities would be unduly prejudicial. The contention is not supported by any evidence of injury. No one who might be adversely affected appeared" (R. 47).

That "rates to Western points beyond the destinations considered have not yet been specifically considered by respondents. Certain disparities would therefore result from the establishment of the proposed rates. The rate from New Orleans to Davenport, Iowa, for instance, would be reduced from 62 cents to 30 cents, but that from New Orleans to Des Moines, Iowa, for a similar haul, would remain at 65 cents. The Mississippi Valley Barge Line Company makes a point of this fact, but no one who might be adversely affected is before us * * *. Respondents expect to deal with these situations on their merits after our decision herein" (R. 48).

PLEADINGS.

Appellant's bill alleges in general the matters above specifically set forth as being the findings of the Interstate Commerce Commission relative to the matters here in issue (R. 1-19).

That said decision and orders of the Interstate Commerce Commission upon the face of same and by specific finding or exact inference sanction rates for all-rail application between the origins and destinations involved, which will dry up much of the water movement and deal barge lines a staggering blow. That, therefore, the report and orders of the Interstate Commerce Commission admittedly refuse to give effect to the mandate of Section 500 of the Transportation Act of 1920, wherein it is expressly declared that water transportation is to be promoted, encouraged and developed, and that both rail and water transportation shall be preserved in full vigor.

That the decision of the Interstate Commerce Commission admits in specific finding that the rates authorized for all-rail application were intended alone to enable the railroads to recapture "traffic," and that the necessary result of this concerted action on the part of rail lines will be to cripple or eliminate water competition.

That, as evidence of the intent and purpose of the rail carrier to eliminate or cripple water transportation, Southern carriers, parties to Emerson's Tariffs, have substantially reduced the rates on every commodity handled by this appellant in excess of 1,000 tons per year (R. 5).

Said Commission, in said decision, has refused and failed to give effect to Sections 1 and 2 of the Sherman Antitrust Act (Act of Cong., July 2, 1890, c. 647, Sec. 1, 26 Stat. 209; U. S. Code, Title 15, Sec. 1).

That said report and orders of the Commission under

exact finding and inference admit a violation of Section 1 of the Interstate Commerce Act, in that the rates authorized or designated were not found to be reasonable, and

A violation of section 2 of said act, in that said rates were admittedly discriminatory, and

Violate section 3, in that the rates approved or authorized will result in undue preference, and

Violate the long-and-short-haul clause, to wit, Section 4 of the Interstate Commerce Act.

The bill further alleged (R. 15) that in order to attract tonnage to the barge-line movement it is necessary that a lower rate than the all-rail rate be applied for the barge-line movement, and that the Commission in various proceedings has recognized this fact in establishment of rates for water-rail movement.

The bill further alleges that the Commission, in its order granting to appellant a certificate of public convenience and necessity, found that the operation of appellant is in public interest and of public convenience, and that the effect of the present decision and orders of the Commission in its Docket 3814 is to withdraw and annul said orders for all practical purposes without said orders being directly brought in issue (R. 11).

That, in so far as the Commission's decision permits and allows the Southern lines to blanket back their rates in order that the Fourth Section of the Interstate Commerce Act may not be violated, it results in violation of sections 2 and 3 of said act, and that the Commission in said de-

cision recognized these violations and makes no defense for same (R. 12-13).

That the appellant presented to the Interstate Commerce Commission a motion for rehearing and/or reargument (R. 15) in connection with its Docket I. & S. 3814, and that this appellant in said motion set forth changed conditions which had resulted subsequent to the making of the record before the Commission, and requested the Commission, by reason thereof, to grant to appellant a rehearing in said cause (R. 15). That said motion was denied by the Commission under date of August 3, 1933 (R. 16), and that the denial of said motion was the denial of a right guaranteed by law.

That the refusal of the Commission to postpone the effective date of the rates designated or authorized in the Commission's order until a three-judge court could be convened and give its consideration to an interlocutory order was arbitrary (R. 17).

That the particular rates approved or authorized by the Commission would result in irreparable loss and damage to this appellant (R. 4).

In conclusion, appellant alleges that by reason of the foregoing, the report and orders of the Interstate Commerce Commission are erroneous, unlawful, invalid, inconsistent, legally arbitrary and violate the Interstate Commerce Act and other particular federal enactments above specifically referred to (R. 18).

Appellant's petition prays for an interlocutory order

and upon final hearing that the Court shall order, adjudge and decree that the said orders of the Commission are, and at all times have been, unlawful and void, and that same be set aside, suspended and annulled (R. 18, 19).

Attached to the petition is Exhibit A, major Southern lines, parties to Emerson's Tariffs; Exhibit B (R. 19-66) is the report and orders of the Interstate Commerce Commission of July 3, 1933, and Substituted Exhibit C (R. 67, 68) is the order of the Commission under date of July 18, 1933.

Answer of the United States of America.

(R. 69-73.)

The United States of America in its answer alleges that appellant is without legal standing to maintain this suit for the reason that it has no legal interest in the subject matter.

That the petition is without equity on its face.

That the petition discloses upon its face that there is nothing in the orders of the Commission to which the injunctive process of the Court can attach, for the reason that the orders merely permit certain tariffs and schedules to become effective.

This defendant then specifically admits or denies various allegations in appellant's bill, to wit, paragraphs 1, to and including 20.

Answer of Interstate Commerce Commission.

(R. 73-80.)

The Commission also admits or denies the allegations in appellant's bill, paragraphs 1, to and including 20.

Alleges that the appellant was guilty of laches in filing a motion for rehearing in that appellant failed to file the same and to call the Commission's attention to said alleged changed conditions until after the report and orders of the Commission.

That prior to the receipt of said motion by the Commission this appellant had filed this suit in the District Court of the United States for the Eastern Division, Eastern Judicial District of Missouri, and thereby elected to proceed in court to obtain such relief and was thereby estopped from now asserting that the Commission ought to have granted said motion, and

Alleges that the appellant is without interest or capacity to institute or maintain this suit for the reason that the orders authorized and justified all-rail rates and that said rates do not apply to traffic over appellant's line.

That appellant's allegation of impairment of its status as a competitor with rail lines, even if such impairment is established, does not and would not constitute a legal injury or one which would entitle appellant to bring and prosecute this action.

Answer of Rail Lines—Interveners.

(R. 81-92.)

In accordance with federal enactment, the rail lines designated in the caption presented to the three-judge court an intervening petition and thus entered their voluntary appearance in this cause and filed an answer in behalf of said rail lines.

Said answer admits and denies the various paragraphs of appellant's petition, paragraphs 1, to and including 20.

Denies that the orders of the Commission in its Docket I. & S. 3814 subject appellant to legal injury.

That appellant has no legal right or interest which will be injuriously affected by said order and therefore has no right to institute and maintain this action.

That because the rates approved or authorized by the Commission took effect prior to said hearing, that the matters presented by the amended petition are moot.

Appellant's Supplemental Petition.

(R. 92, 93.)

Upon intervention of the rail lines designated as interveners, the appellant, by leave of Court first had, filed a supplemental petition, and in said petition asked the Court to order and decree that said rail lines, and each of them, having entered their voluntary appearance, should be enjoined from assessing, collecting or charging rates on sugar

in carloads from the origins and to the destinations specifically designated in Emerson's Tariffs.

OPINION AND FINAL DECREE OF THE THREE-JUDGE COURT.

(R. 93-100.)

The Court in its opinion held:

First. That the allegations and contentions of the appellant that the Commission's finding and orders violated the Anti-Trust Law were answered by the fact that under Federal enactment only the United States can sue to enjoin common carriers for an alleged violation of the Anti-Trust Law with respect to matters within the jurisdiction of the Interstate Commerce Commission (R. 97).

Second. That Section 500 of the Transportation Act of 1920 which provides that both rail and water transportation shall be preserved in full vigor, was not violated and that said section was nothing more than a general statement of policy (R. 99).

The Court entered its final decree wherein it was "ordered, adjudged and decreed that the prayer of the bill of complaint be, and the same is hereby denied, and the bill of complaint is dismissed at plaintiff's cost" (R. 107).

Appellant, prior to said decision, presented to the three-judge court its request for findings of fact and con-

clusions of law, which request in behalf of appellant was not acted upon by the Court (R. 127, 129).

Appellees, in accordance with suggestion of the Court in its decision, submitted findings of fact and conclusions of law which were given by the Court (R. 100-106).

APPEAL.

Whereupon, and within due time under federal statute, appeal was perfected to this, the Supreme Court of the United States of America (R. 118).

AGREEMENT OF PARTIES THAT TESTIMONY OFFERED SHOULD BE CONSIDERED AS COMPETENT ON FINAL HEARING.

As originally intended, the appellant contemplated an interlocutory order and at the hearing introduced affidavits of various parties to support the allegations contained in the bill. When said affidavits were offered the defendants and interveners objected on the sole and specific ground that said affidavits were inadmissible in so far as they stated or purported to state facts inconsistent with or in conflict with the statement and findings contained in the report of the Interstate Commerce Commission dated July 3, 1933, and said affidavits were received by the Court subject to such objection (R. 129, 130). At the conclusion of the hearing the Court suggested that it might be agreeable to waive the interlocutory writ and in response to said suggestion appel-

lant stated that if all parties to the proceeding would agree that the statements contained in said affidavits should be considered by the Court as competent evidence upon final hearing, that the appellant was agreeable to waiving a preliminary writ, and the appellants and appellees agreed that the statements contained in said affidavits should be considered as competent evidence upon final hearing, subject to the specific objection above referred to, and thereupon, the cause was submitted to the Court for final hearing and final decree (R. 130).

ABSTRACT OF TESTIMONY IN BEHALF OF APPELLANT.

(R. 130-135) **M. W. Howe**, general freight agent, Mississippi Valley Barge Line Company, with 12 years' experience in various forms of transportation service, refers to Emerson's Tariffs specifically designated in the bill and submits said tariffs to the Court as a part of his evidence, and states that said supplements were issued on account of the designated participating carriers and set forth the rates on sugar in carload involved in the decision of the Commission in its Docket I. & S. 3814. That sugar tonnage is an important movement over appellant's line. That traffic will not move by barge if rates are the same as rail rates and that this situation is recognized by shippers, traffic officials, and has been recognized by the Interstate Commerce Commission. That the rates designated on the 80,000-pound minimum by the

Commission in its decision and order I. & S. 3814 will carry the great preponderance of sugar tonnage, that he is familiar with the decision and orders of the Commission in its Docket I. & S. 3814, and that the findings in said report admit that the rail rates designated for all rail application—80,000-pound minimum refined sugar carload, will be from 5 to 15 cents less than the competitive rate of the barge-truck movement. That said proposed rates on said 80,000-pound minimum were increased by the Commission 4 cents per 100 pounds and that the said rates so designated and authorized by the Commission result in rates to interior points north and south of the Ohio River from 1 to 11 cents, less than the competitive rate for barge-truck movement from the same origins and to the same destinations; that the particular rates so authorized by the Commission will result in the entire loss of sugar tonnage to barge line unless the barge line rates are reduced to a figure below the rail rate and that giving consideration to the movement of sugar over the appellant's lines during the past years that said reductions will result in the depletion of appellant's revenue and to such an extent that it will make the continued operation of the Mississippi Valley Barge Line Company an unprofitable venture.

That since a hearing of the instant docket before the Commission the major portion of sugar moved between ports by water carriers has moved on rates and via the service of certificated barge line and at rates substantially

higher than 25 cents, and that said rates so designated for all rail application in order for the barge line to secure any sugar tonnage will require a lowering of their port to port rate and that a reduction to a differential under the all-rail rate approved and authorized by the Commission would result in a substantial depletion of appellant's revenue and, in the opinion of the witness, will render the continued operation of the Mississippi Valley Barge Line Company an unprofitable undertaking.

That the rail carriers concurring in the particular tariffs in issue since the presentation of the sugar rates to the Commission, have reduced their all-rail rates in substantial amounts on a large majority of the commodities which have moved by barge lines and that said reductions were general in their application, and that the reductions in the rates on said commodities have resulted in substantial reduction of the revenues of the appellant.

That the Commission in its decision justifies rates from New Orleans and other gulf ports to points in Arkansas and adjacent territory which are higher than rates for points beyond and as a specific example cites the rates fixed by the Commission from New Orleans to Jonesboro, Arkansas, at 34 cents for 486 miles, that Jonesboro, Arkansas, is intermediate between New Orleans and St. Louis by direct routes, and that the rate fixed by the Commission from New Orleans to St. Louis is 32 cents for a distance 698 miles, that no Fourth Section relief is asked or granted to the Southern lines, and that said

situation results in a violation of the Fourth Section of Interstate Commerce Act in that it permits and justifies a higher rate for a shorter distance than for a longer distance over the same route.

That the short-line rail distance from New Orleans to Des Moines, Iowa, is 1,016 miles; that the short-line rail distance from New Orleans to Davenport is 919 miles; that, according to the decision of the Commission, the rate from New Orleans to Davenport, 80,000-pound minimum, becomes 34 cents, while the going rate from New Orleans to Des Moines, Iowa, will remain at 67 cents. That the Commission justifies this situation by the statement that the rail lines intend to cure this violation. That, in the witness' opinion, the only way in which this violation can be cured is by the adjustment of rate to Des Moines to the reduced rate of 34 cents, but this will in turn create the same relative maladjustment to points beyond Des Moines.

(R. 135, 136) **Phil G. Safford**, assistant to the president of the Mississippi Valley Barge Line Company, 20 years' experience in connection with railroads and other transportation agencies: This witness is charged with the responsibility of matters pertaining to appellant's traffic and the rates to be charged upon same; that he is in constant contact with shippers and executives of rail lines with reference to transportation by rail and water; that he is familiar with the various tariffs which have been published and presented to the Commission in connection with vari-

ous rates and upon the particular commodities which have been published for the alleged purpose of meeting water transportation. That the Southern lines, who concur in Agent Emerson's Tariffs referred to in the petition have, since June, 1932, and from time to time, proposed certain tariffs which have carried substantial reductions in rates on the following commodities: Bagging, canned goods, coffee, corn, cotton, glassware, paper and paper products, pulp (paper), rice, soap, sugar, sulphur and tobacco. The rates on canned goods, cotton, rice, soap, tobacco, sulphur, corn, glassware, paper and sugar published by the rail carriers since June, 1932, represent reduction in prior rates of from 15 to 45 per cent below rates theretofore fixed by the Interstate Commerce Commission in various proceedings as reasonable rates. That the rates so reduced by Southern carriers are made solely upon commodities which move by barge line to and via ports on the Mississippi and Ohio Rivers. That the Southern carriers concurring in Emerson's Tariffs have not made corresponding reductions in rates on other commodities which do not move in connection with the barge line. That said reductions have substantially affected the revenue of this appellant and that the commodities upon which the reductions have been made by rail lines constitute 60 per cent of the volume of the business which the barge line has been able to move, and that witness is not aware of any movement that can compensate for the loss of revenues occasions by said reduction. That these losses of appellant's revenue and ton-

nage will prevent the continuation of the operation of this appellant as a profitable venture.

(R. 136-141) **L. W. Childress**, president Mississippi Valley Barge Line Company, a corporation organized under the laws of the State of Delaware. Said company is authorized to engage in and carry on general transportation business in any and all of its branches, both freight and passenger, and to build, construct and own various equipments necessary to such operation.

This witness states that he promoted and organized said appellant corporation and that in said undertaking he was familiar with and advised of the provisions of Section 500 of the Transportation Act of 1920, and relied upon the mandate of said Act that both water and rail transportation would be preserved in full vigor. That appellant corporation has a capital stock of $3,500,000.00, fully paid, and that in its organization no sums were paid for promotion or commission. That he also, as promoter and organizer of said corporation, was also influenced in promoting said venture by reason of the fact that the Federal Government had and was appropriating huge sums of money for making the Ohio, Mississippi and their tributaries navigable for water-borne tonnage, and had provided by enactment for a corporation to be operated by the Federal Government to demonstrate the feasibility and economy of water transportation, and specifically designated in said enactment that the demonstration was for the purpose of

eventually attracting private capital to undertake and continue said operation.

That the appellant corporation, pursuant to its charter, purchased four towboats of 2,000-horsepower capacity, fifty (50) barges of 310-ton capacity, and erected or leased terminals at river ports upon and along the Mississippi and Ohio Rivers, and that the total investment of said corporation in terminals and equipment was in the sum of $3,498,693.11. That appellant's operations began in October, 1930, and since said date appellant has been continuing said operations upon regular schedule with dependable service.

That, in conformity with law, appellant applied to the Interstate Commerce Commission for a certificate of convenience and necessity in Ex Parte 99, 167 I. C. C. 41, and that after public hearing said Interstate Commerce Commission, on or about July 11, 1930, issued a certificate of convenience and necessity to the Mississippi Valley Barge Line Company, and said Commission by order issued specifically found and stated:

> "That the present and future public convenience and necessity require the operation of the Mississippi Valley Barge Line as a common carrier by water upon the Mississippi and Ohio Rivers between Cincinnati and New Orleans and intermediate points."

Thereafter, on the 11th day of March, 1932, by supplemental application, the Interstate Commerce Commission

issued its certificate of convenience and necessity and found that the present and future public convenience and necessity require the operation of appellant as a common carrier between New Orleans and St. Louis and intermediate points.

Witness states that he is in immediate and direct contact with the management and operation of the Mississippi Valley Barge Line Company since its inception, is familiar with the character of tonnage that is moving and the particular origins and destinations of said tonnage and has kept exact records of the revenues obtained in the movement of said tonnage, and that the present operation of appellant corporation has now reached the point where the gross revenues slightly exceed the operating and overhead expenses.

That sugar tonnage of appellant company in years past has constituted 33⅓ per cent of its total tonnage moving over and along its line and approximately 40 per cent of its total revenue.

That the all-rail rate from New Orleans to St. Louis, as a typical example, on sugar carload since 1922 has been 50 cents per 100 pounds, which, in 1932, by Ex Parte 103, was increased by the Interstate Commerce Commission 2 cents per 100 pounds. That the Southern rail carriers, in connection with the tariffs specifically set forth proposed rates as typical from New Orleans to St. Louis of 28 cents on 80,000-pound minimum. The witness states that from his experience in transportation it is necessary, in order

to attract tonnage, that the barge rate be made lower, to wit, differential under the all-rail rate from origins to destinations and that the Interstate Commerce Commission has recognized this principle in Ex Parte 96, 99 and 102, and has directed and prescribed differentials under the all-rail rate of amounts in cents per 100 pounds, to be determined by taking 20 per cent of the all-rail rate applicable between the two ports served by the barge line in a given movement and thus determined the differential relationship between the barge and the all-rail rates.

That the Commission, in its decision and orders, recognized that 80,000 pound minimum rates will carry the preponderance of sugar tonnage and that the rail rates proposed by the rail lines were from 5 to 15 cents lower than the cost of the barge-truck movement to interior points, and in authorizing rates 4 cents higher on this minimum than those proposed, has approved and authorized for application by rail routes rates from 1 to 11 cents lower than those applicable by competitive barge-truck service. That he, and representatives of appellant company, have interviewed shippers of sugar with respect to tonnage, and that these shippers definitely state that they will not continue to patronize barge service except at differentials under the all-rail rate. That he has had compiled figures from the books of appellant company and that said compilation indicates a loss in revenue which would have accrued on the sugar moved by appellant, from January 1, 1931, to July 31, 1932, if the barge-rail rates sug-

gested by the Commission in their order had been in effect during that period, in the approximate sum of $112,000.00. That in its port-to-port movement during the same period the total net loss would have been in the approximate sum of $120,000.00.

That the alleged purpose of the proposed rail reductions was to meet the competition of contract operators on the river. That said contract operators have, with the exception of the American Barge Line, discontinued operation, and that the American Barge Line, whose service is infrequent, is now charging a rate of 25 cents from New Orleans to St. Louis on minimum lots of 450 tons and that this rate does not include the loading and unloading charge and other terminal service, which services are performed by certificated barge lines at an average cost of 9 cents per hundredweight. That thus the cost to the shipper of sugar from New Orleans to St. Louis via the American Barge Line would be approximately 34 cents, or 2 cents per 100 pounds higher than the rail rate authorized by the Interstate Commerce Commission. That on sugar moved to St. Louis via the American Barge Line and points beyond St. Louis, the rail rate in some cases would be as much as 20 cents per 100 pounds lower than the barge-truck rate, and the noncertificated barge lines have no rail-barge rates and consequently do not have the highly important advantage of transit privileges.

That the majority and major portion of the sugar moving by barge line over and along the Ohio and Mississippi

Rivers has moved on rates of 37 cents or 42 cents per 100 pounds; that these particular rates are charged by certificated barge lines having received certificates of convenience and necessity from the Interstate Commerce Commission, and that these particular rates are typical of the character of the competitive rates, and that the proposed rail rates are substantially lower than the rates charged by the certificated barge lines giving regular and dependable service.

Witness reiterates the statement with reference to the reduction in rail rates on the particular commodities mentioned by the preceding witness, and states that they constitute substantially every commodity handled by appellant in excess of 1,000 tons per year, and adds that the rail rate reductions on the same commodities have not been made general by the rail carriers and made applicable to all territory served by rail lines.

That it is within the witness' knowledge and a matter of record that when water transportation has been eliminated or crippled upon the inland waterways that the rail rates immediately thereafter have been substantially increased.

That in the opinion of the witness and from his experience in connection with transportation and traffic matters, if the orders of the Commission are allowed to stand they will eliminate river transportation upon the Ohio and Mississippi Rivers.

That Congress in response to public demand has appro-

priated within the Mississippi Valley and spent within the past, and has appropriated for future expenditures, the total approximate sum of $475,000,000.00 for the purpose of building navigable channels adequate for reasonable, dependable and regular transportation service and terminal facility upon and along the rivers of the Ohio. That the State of Illinois has expended $35,000,000.00 for improvement of the Illinois River. That municipalities and private capital have made huge expenditures for terminals and dock facilities for the accommodation of river-borne traffic and that all of these expenditures will be rendered valueless if water transportation is eliminated.

(R. 142-153) **J. R. Van Slyke** testifies to the request addressed to the Interstate Commerce Commission, Honorable P. J. Farrell, chairman, on July 26, 1933, wherein the Commission was advised that this appellant would file a suit to enjoin the order of the Commission in sugar cases I. & S. 3814. That district judges were away from St. Louis and it was therefore impossible to secure interlocutory stay or order before effective dates of rates, to wit, July 29 and July 31, and "Will the Commission therefore kindly change the effective date of said rate so we can secure service and arrange for expedited hearing by three-judge court (stop) Our representative leaves tomorrow to interview District Court Judge and hasten this hearing with all possible speed (stop) Advise by wire collect." An answer to same was received on July 26,

1933, "Your wire twenty-sixth Commission concludes it cannot consistently comply with your request."

That he had prepared and on July 25, 1933, forwarded to the Interstate Commerce Commission a motion for rehearing and/or reargument and/or modification on behalf of the Mississippi Valley Barge Line Company, Protestant in Docket I. & S. 3814, that said motion was forwarded to the Commission in accordance with its rules of practice and within due time. That said motion presented changed conditions which had resulted and obtained since the making of the record in this proceeding (I. & S. 3814) and on account of said changed conditions asked the Commission to rehear said cause. That thereafter, on, to wit, August 3, 1933, said motion for rehearing was by the Interstate Commerce Commission overruled. Witness attaches a copy of said motion and specifically directs the Court's attention to page 2, and including 18, where specific statement of alleged changed condition is contained (R. 143, 153).

(R. 152-156) **J. D. Beeler**, vice-president, Mead Johnson Terminal Corporation, owning and operating river-rail terminal and warehouse at Evansville, Indiana, total investment in excess of $500,000.00. Said investment made upon assumption of continued operation of water transportation by barge between the City of Evansville and points on the Mississippi and Ohio Rivers. The principal value of said facility is in connection with traffic which has been water-borne and any curtailment of water transporta-

tion will result in decreasing the value and utility of said facility; 66 per cent of its revenue is derived from freight traffic which has been water-borne to, from and via its terminals; has handled approximately 60,000 tons of sugar, one-third was stored in transit for varying periods in warehouse facilities, and this traffic was subsequently moved to points beyond Evansville at through rail-barge rates. The present barge-rail rates applicable on sugar via Mississippi Valley Barge Line in connection with rail lines via Evansville, Indiana, over witness' terminal, thence rail lines to points beyond, are on a materially higher basis than the rates which the Interstate Commerce Commission has authorized for all-rail application from New Orleans to said destinations, principally in the States of Illinois, Indiana and Wisconsin. Witness is in contact with shippers, has been uniformly advised that unless the barge-rail rates are reduced to a differential under the all-rail rate, that no movements by barge route will be made. That since the commencement of operation of witness' company, said company has lost a considerable volume of tonnage and revenue by reason of the reductions in all-rail rates on through traffic which have been put into effect by rail lines for the purpose of eliminating water transportation. Witness cites as an example the item of coffee imported via New Orleans. On September 18, 1932, the rail lines reduced the rates on this traffic 17 cents, New Orleans to Chicago. Thereafter, Mississippi Valley Barge Line Company was unable to maintain barge-rail rates differentially

under the rail rate, and that as a consequence the movement of this traffic was lost to the route via his company's facilities. Prior to this time Mead Johnson Terminal Corporation had handled approximately 6,712 tons of this traffic. The loss in water-borne tonnage will render the Mead Johnson Terminal Corporation an unprofitable venture and render the value of said facilities of questionable future worth.

The United States of America and the Interstate Commerce Commission, defendants therein, presented no testimony.

ABSTRACT OF TESTIMONY OFFERED BY INTERVENING RAIL LINES.

(R. 156-160) **M. L. Costley**, assistant traffic manager, Illinois Central Railway Company, at New Orleans, Louisiana, engaged in rate and traffic work for said railroad at New Orleans for 30 years. As a part of his duty he was to keep himself informed and to know the various tonnage available for shipment from New Orleans to points in the North, including sugar; that there is exceedingly keen competition between carriers reaching New Orleans, including not only rail carriers, but carriers operating barges on the Mississippi River from New Orleans to points in the North, for the transportation of sugar from refineries located in the New Orleans district.

Witness states that since the date of the hearing before the Commission in I. & S. Docket 3814, sugar from the Gulf

and South Atlantic ports has been keenly competitive and with respect to the competition of the rail carriers and the barge lines, it is the same as at the time Docket I. & S. 3814 was heard by the Interstate Commerce Commission. The witness then sets forth contract-barge shipments and shipments of the American Barge Line from New Orleans to ports on the Ohio and Mississippi Rivers and the particular charges which the witness believes were assessed for the tow service from New Orleans to various Ohio and Mississippi River ports, giving some dates of shipments, the boat, and pounds or tons.

(R. 160, 161) **J. L. Sheppard**, general freight agent of the Illinois Central Railroad at Chicago, Illinois, 37 years experience in rate and traffic work for said railroad. That the rates applying on sugar shipped from New Orleans to various points in the Southwest and the North which took effect July 29, 1933, and July 31, 1933, published by rail lines after decision of the Interstate Commerce Commission in its Docket I. & S. 3814, are not in violation of Fourth Section of the Interstate Commerce Act for the reason that said rates, higher to an intermediate point than to points beyond, are protected by Fourth Section Order No. 7542 issued by the Interstate Commerce Commission, and that therefore said rates from New Orleans are not unlawful and void.

SPECIFICATION OF ASSIGNED ERRORS WHICH WILL BE URGED BY APPELLANT IN THIS APPEAL.

(R. 163, 164.)

1. That the three-judge court erred in entering its final decree ordering, adjudging and decreeing that the prayer of the bill be denied and the bill of complaint be dismissed. Assignment of Error No. 1 (R. 108).

2. That the three-judge court erred in giving finding of fact No. IV, requested by the appellees, to the effect that the Interstate Commerce Commission found that the rates which it approved would be compensatory. Assignment of Error No. II (R. 108).

3. That the three-judge court erred in giving conclusion of law No. III, requested by appellees, to the effect that the findings and orders of the Commission were not arbitrary or discriminatory or void or in violation of or contrary to any provision of law or any mandate of Congress, and particularly are not contrary to the mandate of Section 500 of the Transportation Act of 1920. Assignment of Error No. IV (R. 109, 110).

4. That the three-judge court erred in giving conclusion of law No. IV, requested by appellees, to the effect that the Interstate Commerce Commission, in entering the orders complained of did not exceed the powers conferred

upon it by Congress and did not fail to observe or comply with all the requirements of the applicable law in the proceeding before it, but gave heed to all such law and proceeded in full conformity to same. Assignment of Error No. V (R. 110).

5. That the three-judge court erred in giving conclusion of law No. VI, requested by appellees, to the effect that there was no abuse of discretion on the part of the Interstate Commerce Commission in denying appellant's motion for rehearing timely filed with the Interstate Commerce Commission. Assignment of Error No. VII (R. 110).

6. That the three-judge court erred in giving conclusion of law No. VII, requested by appellees, to the effect that the orders of the Interstate Commerce Commission sought to be enjoined and set aside in this suit are valid exercise of authority vested in the Commission and no error was committed in the proceedings and the bill of complaint must therefore be dismissed. Assignment of Error No. VIII (R. 111).

7. That the three-judge court erred in failing to consider, give or reject any and all of the conclusions of law and findings of fact presented by the appellant to the court in accordance with the suggestion of the three-judge court. Assignment of Error No. XVIII, and specific Assignments of Error IX to and including XXVII (R. 111-118).

Statement.

The Interstate Commerce Commission combined for hearing and argument certain other proceedings then pending before the Commission. having to do with sugar rates from Atlantic and Pacific Seaboard to this and other destinations. This appellant is attacking alone the report and orders of the Commission in its Docket I. & S. 3814 designated "Sugar rates from Gulf and South Atlantic Ports."

ARGUMENT.

THE RATES AUTHORIZED BY THE COMMISSION'S ORDERS ARE NEITHER JUST, REASONABLE NOR COMPENSATORY.

The Court below at appellee's request gave the following finding of fact (R. 102, 103):

> "The Interstate Commerce Commission found that the rates which it approved would be compensatory."

The Court to support this finding refers to sheet 21 of the Commission's decision which we summarize as follows (R. 102, 103):

1. That the proposed rates are high enough to pay more than the cost of the service.

2. The earnings would compare favorably with those of Eastern lines just considered.

3. The 30-cent rate from New Orleans to Chicago, for instance, about 13 per cent of the corresponding first-class rate, would yield $240.00 per minimum carload, for the short-line distance of 912 miles.

4. The ton-mile earnings would be about 6.5 mills.

5. System costs for all traffic on the Illinois Central are about 6 mills per ton mile.

6. The traffic considered would be principally added tonnage that could probably be carried at far lower costs.

7. Many commodities are handled by respondent at much lower rate.

We earnestly and sincerely suggest to the Court that there is nothing in these particular findings by the Commission which contain a definite and positive statement that the rates which it approved would be reasonable or compensatory.

The Commission's reference to the term "ton-mile earnings" of the Illinois Central on the movement of sugar under the rates proposed or authorized does not portray the situation, for the reason that any refinery location which is not on the rails of the rail carrier performing the line haul out of the rates now in effect will have to absorb at origin point the particular charges which will be made by the carrier which receives the carload of refined sugar from the refinery and makes delivery at New Orleans to the line-haul carrier which will carry the car to Chicago, Illinois, as an example. Then at Chicago, Illinois, if the consignee is not located on the tracks of the line-haul carrier a charge will be made to said carrier by either the switching line or a rail line which effects delivery of the car at the unloading track. The same character of expense will be chargeable against a line-haul carrier, such as the Illinois Central, in the event said car is destined to a point which takes the same rate as the Chicago rate, in which event the Illinois Central will have to deliver said car at Chicago to the switching line to effect delivery to

the last carrier and pay for said service. The same situation applies when the rail lines grant transit privilege at Chicago and the delivery is effected under this arrangement. These particular charges are substantial in amount and will have to be absorbed out of the through rate, and will materially reduce the ton-mile earnings of 6.5 mills per ton mile indicated in the Commission's report as applicable to the Illinois Central under the rates here involved.

In connection with the statement of the Commission which the three-judge court used to make a finding that the rates authorized were compensatory, we desire to direct the Court's attention to the following:

The Commission and the Court refer to the system cost of the Illinois Central as being 6.5 mills per ton per mile. The Interstate Commerce Commission in its decision, Fourth Section Order No. 15,156, decided November 17, 1933, designated "Grain and Grain Products to Florida," states:

> "From a statement of operating statistics for all Class 1 carriers in the Southern region for the year 1931 it appears that the average freight expense for an average haul of 191.8 miles per revenue ton was 8.2 mills per ton mile."

Since the hearing in I. & S. 3814 was held during the year 1932, the figures referred to in the Commission's report for the Illinois Central are for the year 1931. We

here have a definite contrast as between the earnings referred to of the Illinois Central of 6.5 mills and for all Southern lines of 8.2 mills, who are parties to the tariff in question and who would participate in the movement of sugar under the rates here involved.

In **"Interstate Commerce Commission, Forty-fifth Annual Report on the Statistics of Railways of the United States, for the Year Ended December 31, 1931,"** prepared by the Interstate Commerce Commission and published by the Bureau of Statistics, there appear the annual statements of Class 1 carriers for Southern region. On page 78 there appears the income account of the Illinois Central, and statistics show the Illinois Central operating revenue to be $99,095,977.00, and show the railway operating expense as $80,579,955.00. These figures cover the total for both freight and passenger business. Of the latter figure that portion which was assigned to freight is the figure which produces the system cost of the Illinois Central, cited by the Commission as being 6.5 mills per ton mile. That the $80,579,955.00 shown as "Railway Operating Expenses" does not cover all of the expenses which must be met out of operating revenues is apparent upon an examination of the above referred to income account of the Illinois Central. The net revenue from railway operations is stated as $18,516,022.00, but after a series of additions and deductions of other income and expenses, such as Railway Tax Accruals, rental of equipment, interest on loans, etc., the net income has been completely wiped out and in addition an amount of $1,478,568.00 is shown as being a net

loss. Merely taking the gross revenue on freight shown on page 80 of the above referred to document of $78,264,606.00 and dividing it by the 9,752,000,000 ton miles of revenue traffic handled in 1931 by the Illinois Central as reported in **"Interstate Commerce Bureau of Statistics Comparative Statement of Operating Averages for Class 1 Steam Railways in the United States, Years 1931 and 1932,"** produces a ton-mile earning of 8 mills, which failed to pay all expenses, let alone any return on $154,445,192.00 of capital stock of the Illinois Central, shown on page 76 of the first above-cited statistics as outstanding.

Another comparison which we deem significant taken from these same two **Interstate Commerce Commission Statistics** indicates that while the railway operating revenues for Class 1 carriers in the Southern region was $515,584,069.00, with railway operating expenses of $424,823,685.00, the final net after deducting other expenses is a net loss of $23,494,789.00 (pages S-106, 107 of the first above-cited document). Freight revenue is shown on pages S-108, 109 as being $416,023,095.00. From the second cited document it appears that these carriers handled a total of 37,677,000,000 ton miles of revenue traffic, which figure applied against the gross freight revenue of $416,023,095.00 indicates that a ton-mile revenue of 11 mills per ton per mile failed to pay expenses by over $23,000,000.00, to say nothing of a return on the outstanding capital stock of $886,814,457.00 shown on pages S-104, 105 of the first above-cited document. This indicates the character of earnings that the

rail lines have to obtain before they can earn $1.00 over and above the necessary expense incident to operation, and contrasted with the statement of 6.5 mills as used in the Commission's report, indicates the character of the rates proposed by the Southern lines and the character of the rates authorized by the Interstate Commerce Commission.

The Interstate Commerce Commission in its finding and decision recognized that the rates sought to be reduced by the proposed schedule have been in existence as the going rates for rail application since 1922.

In 1922 the Interstate Commerce Commission gave consideration to the sugar rates from various origins and to various destinations, including rates from New Orleans to Chicago, and in its decision, 81 I. C. C. 448, 472, the Commission found that the then going rate from New Orleans to Chicago of 60 cents per 100 pounds was not unreasonable. Commissioner Campbell, in connection with this decision, held that the rates from New Orleans to destinations north of the Ohio River and east of the Mississippi River, including the 60-cent rate to Chicago, were unreasonable minimum (81 I. C. C. 448, 480). The Interstate Commerce Commission, subsequent to this decision, indicated to the carriers and shippers that they should "compose their differences." As a result of this suggestion, carriers and shippers agreed on a rate from New Orleans to Chicago of 54 cents per 100 pounds, and related rates were published to other destinations. This

rate then bore the badge, according to the Commission's decision, of being less than a reasonable or compensatory rate.

The Commission thereafter, in Burlington Shippers Association v. A. T. & S. F. R. R. Co., 88 I. C. C. 46, 48, said:

> "In Sugar Cases of 1922, 81 I. C. C. 448, we indicated that the rate of 54 cents from New Orleans to Chicago is less than a reasonable maximum rate."

By direct inference the Commission states that the 54-cent rate from New Orleans to Chicago was in the realm of a noncompensatory rate.

This rate of 54 cents and rates to other destinations related to the Chicago rate were approved by the Commission at a time when a rate war was imminent between various rail carriers, and in said cause the rail carriers seriously urged the Commission to invoke its minimum rate power in order to approve of said rate.

Sugar is classified by all-rail lines, including the rail carriers involved in I. & S. 3814 as fifth class, and in the various territories this is from 35 per cent to 45 per cent of the first-class rate. Sugar now and in the past has moved on this basis in Official Classification territory. This statement indicates what rail lines consider a reasonable rate upon sugar. The Commission in Southeastern Sugar Investigation, 132 I. C. C. 447, prescribed as a reasonable rate on refined sugar, carload, 27½ per cent of

the first-class rate. The rate proposed by same rail lines involved in the previous case from New Orleans to Chicago on 80,000-pound minimum is a little less than 13 per cent of the applicable first-class rate. The rate authorized by the Commission is 16 per cent. This statement answers the question of whether or not the rates proposed by the rail lines for application were reasonable or compensatory rates for the movement of sugar.

The rates put into effect by virtue of the decision and direction of the Interstate Commerce Commission in 1922 continued in effect for over eleven years without complaint filed by any shipper, and there was no contention made that the level of those rates was beyond reasonable rates. The Commission thereafter, in Ex Parte 103, 178 I. C. C. 539, specifically found that the going rates on sugar were one of the low spots in the rate structure and increased the rates on sugar 2 cents per 100 pounds, which produced a rate of 56 cents from New Orleans to Chicago and 52 cents from New Orleans to St. Louis, and the rates to other destinations were related thereto. These are the particular rates which were in effect at the time of the hearing of the Commission's Docket I. & S. 3814. The rate proposed by the tariffs involved in the Commission's decision upon the 80,000-pound minimum from New Orleans to Chicago is 30 cents, a reduction of 26 cents in amount, and a reduction in per cent of 46 per cent. The Commission on this minimum approved a rate of 34 cents, which results in a reduction of 22 cents in the rate which

had been in existence and satisfactory to carriers and shippers for a period of eleven years.

The rates proposed by the rail line from New Orleans to St. Louis on the same minimum was 28 cents. The Commission approved a rate of 32 cents. This is a reduction of 20 cents per 100 pounds. Under the evidence and in accordance with the Commission's exact statement, these are the particular rates which will carry practically all of the sugar tonnage.

As further evidence of the character of the rates which the Commission approved or designated, and taking the exact finding of the Commission as a basis of our statement, we find that the rates from New Orleans to Terre Haute, Indiana, will become 34 cents under the authority of the Interstate Commerce Commission, while the going rate from New Orleans to Paris, Illinois, 19.1 miles from Terre Haute, continues at 56 cents per 100 pounds.

Another situation exactly found to result from the Commission's orders and specifically referred to in their finding is the rate from New Orleans to Davenport, Iowa, which rate becomes 34 cents, while the rate from New Orleans to Des Moines, Iowa, for practically the identical haul, remains 65 cents. These particular illustrations are typical of the entire situation which is produced under the authority of the Interstate Commerce Commission and in connection with the movement of sugar, carload, by rail line. These illustrations indicate in no uncertain terms

the character of the rates which the Commission authorized for all-rail application.

In connection with the above illustration, it should be noted that Southern carriers would participate in the movement of sugar, carload, from New Orleans, to both Paris, Illinois, and Des Moines, Iowa, as typical. They would take a division of the through rate for their services in effecting said movement. According to any known method of arriving at a division among rail lines they would receive upon a division of the rate to either Paris, Illinois, or Des Moines, Iowa, an amount in excess of the going rate to Terre Haute or Davenport. To illustrate, if it is on a mileage prorate the carrier moving the sugar from New Orleans through Davenport to Des Moines would take approximately nine-tenths of the 67-cent rate, approximately 60 cents. The Southern rail lines cannot and do not contend that the going rates to Paris, Illinois, and Des Moines, Iowa, are excessive or unreasonable rates. It therefore follows that the rates to Terre Haute and Davenport, as approved and authorized by the Commission in its orders and in its Docket I. & S. 3814, of necessity are neither reasonable nor compensatory rates. We therefore suggest that the Commission, having in its prior decisions determined reasonable rates for refined sugar, could not consistently find these rates reasonable or compensatory, but simply found that the rates proposed "are high enough to pay more than the cost of service." This is not a finding by the Commission that the rates are

either reasonable or compensatory; it is a finding alone that the rates charged pay alone the out-of-pocket costs for the specific transportation service performed and falls far short of a finding that the rates are of such a character as will enable the rail lines to continue as efficient and effective transportation agencies. Such a finding does not give consideration to the necessary cost and expense which rail lines must pay in order to cover overhead, necessary and reasonable maintenance, repairs, improvements and betterments, as well as pay interest on invested capital, which are essential and necessary to the continuation of rail transportation service.

That the rates proposed cannot be considered as reasonable or compensatory is further patently demonstrated by the finding of the Commission that the rates proposed from the origins here involved to destinations such as St. Louis will blanket back as far south as Northern Alabama, Northern Mississippi and Northern Georgia points. The Commission, in Southeastern Sugar Investigation, 132 I. C. C. 477, prescribed as reasonable rates on refined sugar, carload, for application within the Southern territory, the same origin territory as involved in the Commission's Docket I. & S. 3814, 27½ per cent of first class. This basis would carry sugar from New Orleans or Mobile on the proposed rate of 28 cents a distance of from 180 to 200 miles from such origins. On the basis of the 32-cent rate found justified this basis would carry the sugar a distance of 261 to 280 miles from such origins, and on the basis of

34 cents would carry the sugar from 281 to 300 miles. Here we have a definite and positive comparison of what the Commission considers the volume of reasonable rates on refined sugar carload for application within Southern territory and the rates which they justified for the same commodity moving from Southern destinations to destinations in Southern territory and points beyond. The Commission in this decision has justified a rate of 34 cents from New Orleans to Chicago, a distance of 912 miles, and has justified a rate of 32 cents from New Orleans to St. Louis, a distance of 698 miles, or to consider points alone within Southern territory the rate authorized by the Commission from New Orleans to Cincinnati, a distance of 836 miles, is 34 cents.

The motivating force that occasioned the rail lines to make the drastic reduction in the sugar rate was alone to recapture sugar traffic. This is borne out by the Commission's finding. "These cases represent a contest among railroads, water and motor truck for that great volume of sugar traffic," and "carriers are seeking * * * drastic and sweeping * * * reduction in rates, with the hope of recapturing their losses of traffic—they may consider even lower rates if those proposed * * * do not prove sufficiently effective." Also, "One of the main questions in this connection is whether respondents should be allowed to establish a rate to a water-competitive point, Chicago for instance, made solely with regard to water competition at that point."

We urge upon these findings that the Commission excludes the idea that the rail carriers, in proposing the rates in question, were giving consideration to anything other than their purpose to recapture sugar tonnage.

Under the evidence in this case and giving effect to the exact findings of the Commission in its decision, the conclusion seems justified, if not inevitable, that the rail lines, in the rates they proposed, were not intending and did not have in mind the meeting of the competitive rate of the barge operators who carry by far the major portion of the sugar tonnage. Their evident intent and purpose is to eliminate, rather than to meet, water competition. This is disclosed by the level of the rates which the rail lines propose. The rates proposed are not in any way related to the going rates charged by responsible and reliable barge lines as distinguished from the tramp operator. The proposal of a 28-cent rate from New Orleans to St. Louis to meet a barge rate of 42 cents cannot be reconciled with the alleged intent of rail lines to meet a competitive situation. The proposal of a 30-cent rate from New Orleans to Cincinnati and Louisville to meet a competitive barge rate of 44 cents, and the proposal of a 28-cent rate to Evansville and Cairo to meet a competitive barge rate of 39 cents, cannot be reconciled with the alleged purpose of prescribing rates which are to meet the rate of a competitor (R. 39-41).

The Commission indicates that the carriers' intention in proposing the rates in controversy was to meet alleged

competitive rates of contract barge operators, but the Commission expressly denies this inference when it specifically finds that nine-tenths of the water-borne sugar tonnage moves by the standard and responsible barge lines on rates of 37 cents and 42 cents from New Orleans to St. Louis (R. 44).

The Commission further finds that the low rates of contract-barge operators have not had an adverse effect upon the traffic of the standard or certificated barge lines and that the slow, sporadic and uncertain service of the so-called contract-barge operators is unsatisfactory to some shippers and is used only to supplement other transportation (R. 44). The Commission specifically calls attention to certain quoted contract-barge rates but finds that "so far as appears such rates have not been used" (R. 40).

The conclusion from this finding by the Commission is that the rail lines intended, and the Commission has approved of a volume of rates which were intended, not to meet the competitive rate of the barge line that carried 90 per cent of the sugar tonnage, but to eliminate water transportation.

The decision of railway executives to base their rates upon rates which, if used at all, were used to move not more than one-tenth of the water-borne sugar, would certainly be open to just criticism. If the rail lines did not have the intent and purpose that we suggest, then they

would have proposed rates with some reasonable relationship to the going rates of the standard barge lines.

THE ORDERS OF THE INTERSTATE COMMERCE COMMISSION HERE COMPLAINED OF ADMITTEDLY SANCTION A VIOLATION OF THE TRANSPORTATION ACT OF 1920.

Appellant urges that the express finding of the Commission as contained in this report, and the exact and definite inferences therefrom, establish the fact that the Interstate Commerce Commission refused and failed to give effect to Section 500 of the Transportation Act of 1920 (41 Stat. L. 499, Act of Cong. Feb. 28, 1920, c. 91, Sec. 500, 41 Stat. 499; 49 U. S. Code, Sec. 142), and that said orders are therefore unlawful and void.

This enactment reads as follows:

> "It is declared to be the policy of Congress to promote, encourage and develop water transportation, service, and facilities in connection with the commerce of the United States, and to foster and preserve in full vigor both rail and water transportation."

Appellant suggests that Congress, by this enactment, voiced its mandate to federal agencies, specifically directing them in their deliberations and decisions to promote, encourage and develop water transportation.

The Interstate Commerce Commission up to this decision has so construed said enactment.

We cite the following:

Tin Plate to Sacramento, 140 I. C. C. 643. The Commission was considering rates proposed by the railways which were lower than the then effective rates of competing water lines. The Commission canceled the proposed reduction and said (at page 647):

> "• • • It clearly would defeat the intent of Congress to foster transportation by water as well as rail in full vigor if in any case rail carriers were permitted, at little or no profit to themselves, to operate so as to deprive water carriers of traffic which they now enjoy, and upon which their continued existence depends to some extent."

In Iron and Steel Articles from Chicago District, 163 I. C. C. 369, the Commission said:

> "There is no provision of the act which gives us authority to relieve the carrier from complying with the provisions of section 3 whenever they desire to divert traffic from their water competitors to their own line, and even if we had such authority we could not exercise it here without defeating the declared policy of Congress to promote, encourage and develop water transportation service and facilities."

In Reduced Commodity Rates to Pacific Coast, 89 I. C. C. 512, 538:

> "The policy of Congress in this respect can be effectuated only under rate adjustments which will

permit of an equitable distribution of the available traffic."

Also, in United States War Department against Abilene and Southern Railway, 77 I. C. C. 317, the Inland Waterways Corporation sought to compel the railways to establish just and reasonable divisions of joint rates. The Commission, after quoting section 500, said (at page 353):

> "In view of the experience that the country has had with recurrent rail congestion and car shortages and with increased rates, the possibilities which these waterways offer as a means of adding to the sum total of transportation facilities and of providing a cheaper form of carriage are plainly of prime public impotance. Clearly everything that can be done ought to be done to give this experiment a fair opportunity to demonstrate its worth. * * * "

In Transcontinental Cases of 1922, 74 I. C. C. 48, 71, the Commission said:

> "It clearly would defeat the intent of Congress to foster transportation by rail and water in full vigor if the rail carriers were permitted, at practically little or no profit to themselves, to operate so as to deprive water carriers of traffic which the water carriers would naturally handle."

In Consolidated Southwestern Cases, 123 I. C. C. 203:

> "To permit the rail lines from St. Louis, Chicago, Pittsburgh, Cleveland and other points to maintain

rates so low as to deprive such water carriers of the traffic naturally theirs, is not in accordance with the spirit of section 500."

Other enactments of Congress demonstrate the same intent and purpose.

By the Inland Waterways Transportation Act (43 Stat. 360, 49 U. S. Code, Sec. 151) Congress provided for a corporation to operate over and along the Mississippi River and its tributaries in order to demonstrate the feasibility of inland water transportation and specifically provided that said facilities, when said purpose was demonstrated, should be sold to private persons or corporations and not to any person or company directly or indirectly connected with any carrier by rail.

A similar federal enactment is The Panama Canal Act of 1912 (37 Stat. L. 560, 566, now embodied in Section 5 [10] of the Interstate Commerce Act, 49 U. S. Code, Section 5), which makes it unlawful for any railroad to own or have an interest in a water carrier operating through the Panama Canal.

Section 8 of the Merchant Marine Act (41 Stat. 992, 46 U. S. Code, Sec. 867) indicates the same general intent to foster water transportation.

The decision of the three-judge court specifically finds that section 500 is "nothing more than a general statement of policy" (R. 99), but we answer that every statute and lawful enactment is of such character. Statutes which declare the intention of the lawmakers constitute the law

of the land, and statutes, of necessity, are declarations of legislative discretion—policy and intent.

The genesis of this enactment we urge as significant. Congress, in the Transportation Act of 1920, undertook to deal with transportation. The first portion of this enactment was intended to take the railroads out of federal control. Sections 400 to 441 were amendments to the Interstate Commerce Act and are portions of the particular law under which the Commission now functions, and as part and parcel of said enactment Congress incorporated title V, section 500. The entire bill was passed as a law with an enactment clause signed by the presiding officers of both branches of Congress and approved by the President of the United States. Said enactment, therefore, dealing with transportation and the functions, duties and powers of the Interstate Commerce Commission, was intended to be a mandate to federal administrative bodies having to do with said matters.

Under Senate Resolution No. 17, addressed to the Interstate Commerce Commission, said Commission was required to prepare a manuscript in form suitable to be printed, covering the text of those provisions of law which, first, are administered by the Commission, and, second, affect the Commission's work, powers or duties. This resolution was passed on January 28, 1927, and the Commission, in response to said request, transmitted to the President of the Senate of the United States under date of December 31, 1929, volumes designated "Interstate Com-

merce Act Annotated," and under the second requirement of the above resolution included in volume 4 the Transportation Act of 1920, including section 500, as being a provision of law which affects the Commission's work, powers or duties. It is also significant that the Commission incorporated in said volume the Sherman Antitrust Law.

We note the reading of section 500. It provides that water transportation is to be promoted (not eliminated), encouraged (not discouraged) and developed (not destroyed) in connection with the commerce of the United States, and also provides that both rail and water transportation are to be fostered and preserved in full vigor. The purpose, policy and intent of Congress contained in this enactment admit of no uncertainty. This law is binding upon federal agencies and instrumentalities, and it is positive that the particular federal agency to which this mandate is expressly addressed is the Interstate Commerce Commission and was intended to govern the actions, deliberations and decisions of said Commission.

This statute of necessity is more than a mere gesture and we urge that it is a positive direction which no administrative body of the Federal Government can ignore or set at naught, particularly in a decision which admits of this result.

The three-judge court decision states that this statute contains no immunity from competition (R. 99). Appellant has not and does not now make such a contention, but

does assert that the statute guarantees competitive transportation facilities.

Under the Interstate Commerce Act the only rates which the Commission is authorized to prescribe are just and reasonable rates and if the Commission had established a just and reasonable rate for rail lines in this particular proceeding, and then by proper proceedings had established reasonable differentials for water lines, this would have exactly met the competitive situation and would have resulted in just and reasonable rates for both transportation facilities. This appellant is agreeable to the proposition that both rail and water lines can and should be able to compete for this sugar tonnage and upon a competitive basis. The rates authorized by the Commission are such as will "dry up the water movement" and "be a staggering blow to water transportation" and "take away the net earnings of the Federal Barge Line."

This particular statement affirms the contention here made. If the proposed rates will produce the result above indicated for a federal instrumentality which operates on Government money, pays no taxes or other expenses incident to private ownership, the apparent and patent result to this appellant and others similarly situated is certain. There was no occasion or reason for the Interstate Commerce Commission to authorize rail rates from the origins here involved to destinations north and south of the Ohio River from 1 to 11 cents lower than the competitive rate of the water-truck service. Heretofore, of the total ton-

nage of Class I Southern carriers and regulated barge lines) the rail carriers moved in excess of 95 per cent. The rail lines have reduced their rates on many commodities for the apparent purpose of taking from the barge lines tonnage which is available to water movement, and now as to sugar they desire to take from barge lines sugar tonnage. The rail carriers are not satisfied with traffic in excess of 95 per cent of the total tonnage moved. The relative importance of this sugar tonnage to the rail and barge line is exactly indicated in the Commission's report, wherein the Commission finds:

> "Its (appellant's) most important traffic is northbound sugar, which constitutes about one-third of its total tonnage and yields about 40 per cent of its total revenue. The Federal barge line is even more of a sugar carrier, sugar constituting about 50 per cent of its northbound traffic. * * * Although the sugar traffic in its present volume is almost vital to the existence of the barge line, it would constitute but a small part of the traffic of respondents [rail lines]. For the four years from 1928 to 1931, inclusive, the ratio of total tonnage averaged 1.4 per cent for the Illinois Central, 0.2 per cent for the Louisville and Nashville Railroad Company and 0.5 per cent for the Southern Railway Company (R. 46)."

The admitted result which will obtain under the rates approved or authorized by the Commission will be to take sugar tonnage from the water lines and cripple or eliminate water transportation.

The Court continues and says that there is nothing in this statute to indicate an intention on the part of Congress that a common carrier by water was to be given a preference in rates over a common carrier by rail (R. 99). This appellant does not make such a contention. The appellant is here contending for the right to continue in existence as a transportation agency and is contending that under the law the Interstate Commerce Commission has no right, power or authority by its decision to select rail lines as the sole transportation facility which is to carry the commerce of the United States.

The three-judge court continues and states that there is nothing to indicate that a shipper was to be required to pay for transportation of a commodity, where rail and water lines were in competition, a rate high enough to enable each carrier to operate at a profit (R. 99). This statement of the Court would be significant if it were not a fact beyond the peradventure of dispute that water transportation is an operation which can be conducted at substantially less cost than transportation by rail, and of necessity it is true that any rail rates which are below reasonable rates for water lines are below reasonable or compensatory rates for rail application. The Interstate Commerce Commission in various decisions has recognized this situation. We quote from Inland Waterways Corporation v. A. G. S. R. Co., 151 I. C. C. 126, 144:

"The barge line differentials are based upon the

premise that the service costs less and is worth less than the rail service for which it competes."

As evidence of the effect that the rates approved or authorized by the Commission will have upon water transportation, we briefly quote from the testimony presented in behalf of the appellant in this cause undisputed by any testimony presented by appellees.

Mr. Howe testified "that giving consideration to the movement of sugar over the petitioner's line during the years that he has been connected with the company, that such reductions will result in the depletion of the company's revenue and to such an extent that will make the continued operation of the Mississippi Valley Barge Line Company an unprofitable venture" (R. 132). Also, "that if any sugar is to be moved over the barge line it will be necessary for the barge line to reduce its rates for its port to port movement lower than the rates justified or designated by the Commission in its decision and order for application for rail movement, and that such a reduction in its rates, giving consideration to the tonnage of sugar that it has moved in the past, will necessarily result in material and substantial depletion of its revenue" (R. 132), and in the opinion of the witness, "will render the continued operation of the barge line an unprofitable venture."

Mr. Safford states that he is familiar with the various tariffs that have been published and presented to the

Commission in connection with various rates which have been prescribed for the alleged purpose of meeting water transportation, and that the Southern lines, who are concurring carriers in Agent Emerson's tariffs referred to in the petition in the instant case, have since June, 1932, and from time to time proposed certain tariffs which have carried substantial reduction in rates on the following commodities: Bagging, canned goods, coffee, corn, cotton, glassware, paper and paper products, pulp (paper), rice, soap, sugar and tobacco. The rates on canned goods, cotton, rice, soap, tobacco, sulphur, corn, glassware, paper and sugar, published by the rail carriers since June, 1932, represent reductions in prior rates of from 15 to 45 per cent below rates theretofore fixed by the Interstate Commerce Commission as reasonable rates in various proceedings. The rates so reduced by Southern carriers are made solely upon commodities which move by barge lines to and via ports on the Mississippi and Ohio Rivers, and that Southern lines have not correspondingly reduced rates on other commodities which do not move in connection with the barge line (R. 135).

The evidence of appellant is positive, giving consideration to the tonnage moved and the revenues derived from sugar, that the reduction in the rates approved by the Commission will certainly cripple and eventually eliminate water competition. In order to encourage, develop and foster water transportation, as well as rail, some character of reasonable return is necessary in order

that these competitive agencies may be kept alive. The history of rail rates in evidence in this case demonstrates the fact that the crippling or eliminating of water transportation has resulted in the shipper paying rail rates upon more than a substantially higher level.

This particular situation was recognized by the Honorable Joseph B. Eastman, member of the Commission and now Coordinator of Transportation, in his concurring opinion in Fourth Section Application 14734, in the following words (decided May 8th, 1933, not yet reported):

> "After the railroads swept the inland waterways practically clean of competitive traffic, two influences set in. One was a public demand upon Congress for an appropriation by the Government for waterways so that they would handle traffic more cheaply and efficiently. The other was a gradual revision of the railroad structure to a so-called dry land basis. This return of competition has so alarmed the railroads that they are clearly about ready to go back to their old policy of rate cutting, and have already made several moves in this direction. If they continue with this policy uncorrected, I have little doubt that they will eventually cripple their water competitors as they were crippled in days gone by."

This reference is especially significant since it was rendered just prior to the decision of the Commission in its Docket I. & S. 3814.

Section 500, being a statute, is more than a mere ges-

ture; it is a positive direction which no administrative body of government can ignore or set at naught, particularly in a decision which admits that water transportation will be crippled or eliminated.

Appellant suggests that this Court has recognized this enactment as being a statute containing a mandate to the Interstate Commerce Commission. We refer to United States of America et al. v. Illinois Central Railroad Co., decided March 5th, 1934:

> "The Transportation Act, 1920 (U. S. C., Title 49, Sec. 142), declares the definite policy of Congress to be 'to promote, encourage, and develop water transportation, service, and facilities in connection with the commerce of the United States' (C. R. I. & P. Ry. v. United States, 274 U. S. 29, 36). In the light of the situation disclosed by this report and of the policy declared by the act just named, Congress evidently prescribed the course of procedure which Section 3(e) requires."

We therefore urge that the orders of the Commission are unlawful and should be annulled.

THE ORDERS HERE COMPLAINED OF SANCTION A VIOLATION OF THE ANTITRUST LAWS AND ARE THEREFORE ILLEGAL.

Appellant in its petition alleges that the decision and orders of the Interstate Commerce Commission here in issue admittedly violate Sections 1 and 2 of the Sherman

Act (Act of Congress, July 2, 1890, c. 647, Secs. 1 and 2, 26 Stat. 209, U. S. Code, Title 15, Secs. 1 and 2).

Section 1:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal. * * *"

Section 2:

> "Every person who shall monopolize or attempt to monopolize, or combine or conspire with any other person or persons to monopolize, any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor. * * *"

The reductions in rates complained of by the appellant were initiated through concerted action of the various executives of the Southern lines who authorized their publishing agent to prepare, present and file drastic and sweeping reductions in the going sugar rate. Clearly this concerted action comes within the prohibition of the foregoing statute if it results in restraint of trade or a monopoly. Federal courts in considering these statutes have held that actual intent to eliminate competition is not necessary in order to make the acts unlawful. For the convenience of the Court we submit the following: O'Halloran v. American Sea Green Slate Company, 207 Fed. 189:

> "I acquit the defense of any willful purpose or

conscious design to violate this act; but this is no defense if the agreements made and their execution necessarily operate to unduly and unreasonably restrain trade or commerce among the several states."

To the same effect is United States v. Union Pacific R. R. Co., 188 Fed. 114.

Northern Securities Company v. United States, 193 U. S. 197:

"In all prior cases in this court the Antitrust Act has been construed as forbidding any combination which by its necessary operation destroys or restricts free competition among those engaged in interstate commerce. In other words, that to destroy or restrict free competition in interstate commerce was to restrain such commerce."

Also, United States v. Knight & Co., 156 U. S. 1:

"It is not essential that its result shall be a complete monopoly. It is sufficient if it really tends to that end and to deprive the public of the advantage which flows from free competition."

The Commission by exact finding and inference clearly admits that the rates authorized will result in restraint of trade and commerce among the several states and that it will tend to produce monopoly in the trade and commerce among the several states. The exact statement of the Commission, which among others confirms this, is that the rates as applied to interior points alone

> "would probably bring respondents a heavy traffic, would stop a large part of the distribution of water-borne sugar and dry up much of the water movement" (R. 42, 43),

and that

> "if respondents succeed the barge lines will be dealt a staggering blow" (R. 46).

Under the evidence presented by the appellant we respectfully submit that the necessary effect of the rates approved by the Commission is immediately to cripple and eventually to put out of business this appellant and all other common carriers by water operated as private enterprises, and that the inevitable result is to create a monopoly in the transportation field and place same in the rail lines, which field is now served by both rail and water carriers.

We respectfully contend that another portion of the record in this cause clearly portrayed an exact intent on the part of the rail lines to eliminate water transportation. We refer to the testimony of the witnesses in behalf of appellant, which establishes the fact that the Southern lines who proposed these rates on sugar have since June, 1932, proposed certain tariffs which have carried reduction in rates of from 15 to 45 per cent on the following commodities, to wit: bagging, canned goods, coffee, corn, cotton, glassware, paper and paper products, pulp (paper), rice, soap, sugar, sulphur and tobacco. The rates on canned

goods, cotton, rice, soap, tobacco, sulphur, corn, glassware, paper and sugar so reduced were rates which had been fixed by the Interstate Commerce Commission as reasonable rates in various proceedings. The reductions so made in said rates were alone upon commodities which moved by barge lines to and via ports on the Mississippi and Ohio Rivers. The same rail lines did not make corresponding reductions in other territories or on commodities which did not move in connection with the barge lines (R. 135).

As further evidence of this intent, we call the Court's attention to the finding of the Commission wherein the Commission specifically states that the rail lines "may consider even lower rates if those proposed are established and do not prove sufficiently effective" (R. 22). This suggestion is further borne out by the fact that the rail lines reduced rates which had been in effect without complaint for a period of eleven years, and the amount of the reductions proposed are significant and can be interpreted alone in accordance with this suggestion.

The Southern lines did not ask for Fourth Section relief and therefore would be required to blanket back the proposed rates to points as far south as Western Tennessee and Northern Mississippi, Alabama and Georgia (R. 39). If the rail lines had been sincere in an effort to meet water competition they would have proposed rates which bore a definite relationship to the going rates of standard barge lines, and if this alone had been their purpose they would have asked for Fourth Section relief in order to

charge higher rates at intermediate points which were not directly affected by the port-to-port movement of the barge service. The above statement indicates another motive. The rail lines forego the level of reasonable rates to the intermediate points to destinations such as Chicago, St. Louis and Ohio River ports and blanket the rates back to the points above indicated, and this can only be reconciled with a purpose and intent to cripple water transportation. The purpose of the rail lines, we contend, is directed alone against the elimination of water-borne traffic, and this intent is to be carried into effect regardless of the revenues which will accrue to the rail lines for the service performed. This is evident by the fact above stated, that the rail lines under their proposal are still charging a 28 or 30 cent rate on sugar, carload, from New Orleans and Mobile, Alabama, to points in Northern Mississippi, Alabama and Georgia, and under their proposal would charge the same rates to Chicago and St. Louis, respectively, from the same origin. The rates by rail lines and the rates authorized which these lines are now charging on sugar evidence the fact that the rail lines have a definite and well-defined purpose and that the decision and order of the Interstate Commerce Commission brings this purpose to a successful conclusion.

The appellant is here contending that the orders of the Commission are unlawful, in that same permit and sanction a violation of the anti-trust laws.

The three-judge court decision disposes of this conten-

tion with the statement "that only the United States can sue to enjoin for an alleged violation of the anti-trust laws a combination of common carriers subject to the provisions of the Interstate Commerce Act with respect to a matter within the jurisdiction of the Interstate Commerce Commission," and cites for its authority the proviso contained in the act (U. S. Code, Title 15, Par. 26).

The proviso to which the Court refers reads as follows:

> "Provided that nothing herein contained shall be construed to entitle any person, firm, corporation or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of this Chapter 1 of Title 49, Transportation, in respect of any matter subject to the regulation, supervision or other jurisdiction of the Interstate Commerce Commission."

The original bill as filed by appellant and the amended bill was brought alone against the United States of America and the Interstate Commerce Commission as defendants by virtue of the District Court Jurisdictional Act (36 Stat. 539, as amended, and 36 Stat. 542, as amended, U. S. Code, Title 28, Secs. 41 [28] and 46).

The rail lines mentioned in the caption voluntarily intervened in this proceeding at the time of the hearing before the three-judge court, and in an intervening petition in their behalf stated:

"In accordance with the provision of Section 212

of the Judicial Code (U. S. C. Title 28, Sec. 47, Subdivision 27) we hereby enter the appearance of"

and then specifically named the rail lines presenting said petition and filed an answer in behalf of said rail carrier.

Appellant respectfully urges that it did not violate the statute to which the three-judge court refers in its decision. The suit was not instituted against common carriers; the suit as instituted was under authority of a specific federal statute against the United States and the Interstate Commerce Commission alone to annul and set aside a certain report and orders of the Interstate Commerce Commission. The rail lines voluntarily and in accordance with express authority of federal enactment entered their appearance in said cause as intervener. Therefore, and of necessity, the fact that rail lines came into this proceeding voluntarily cannot annul the exact authority under which this suit was instituted by appellant and make it impossible for this appellant to have a ruling by this Honorable Court as to whether or not a federal agency and instrumentality has rendered a decision which is admittedly contrary to the Sherman Act. If the theory of the three-judge court is correct, then rail lines under authority of a federal statute and in a proceeding of this character can at any and all times defeat such a proceeding by appearing as interveners in said cause.

We suggest that the Commission's findings lead to the positive conclusion that the rates in question will restrain

commerce among the various states and tend to produce a monopoly in the rail lines, and that therefore the orders of the Commission are unlawful.

THE COMMISSION'S FINDING AND ORDERS VIOLATE THE PROVISIONS OF THE INTERSTATE COMMERCE ACT.

The appellant urges that the Commission, by specific findings, admits that its decision and order violate specific provisions of the Interstate Commerce Act. We quote:

> "If the schedules were approved the rate from New Orleans to Terre Haute, Indiana, for instance, would be reduced from 56 to 30 cents, while to Paris, Illinois, and nearby points the rate of 56 cents would remain."

The Commission, on the 80,000-pound minimum, increases this proposed rate from 30 cents to 34 cents. Terre Haute, Indiana, is 19.1 miles from Paris, Illinois. The spread between these two rates which the Commission permits and allows is 22 cents for a difference in distance of 19 miles, and is so great as to patently establish the fact that Section 3 of the Interstate Commerce Act is violated. The statement of the Commission with reference to this situation we contend affirms this conclusion. The Commission said:

> "No one who might be adversely affected appeared" (R. 47).

The positive inference of this statement is that the receiver of sugar at Paris, Illinois, is adversely affected, by reason of an undue preference given to Terre Haute in connection with the movement of sugar by rail. This is the sole excuse that the Commission gives. Another similar situation is specifically set forth in the Commission's decision, to wit, the rates that they approved from New Orleans to Davenport, formerly 62 cents, were reduced to 34 cents, and the fact that the rates from New Orleans to Des Moines, Iowa, "for a similar haul would remain 65 cents." The difference in distance is less than 100 miles. The Commission said:

> "Respondent is expected to deal with these situations upon their merits after our decision herein" (R. 48).

This statement of the Commission admits of the unlawfulness of the rate situation which the Commission's decision produces. There can be no question but if the rate to Des Moines of 65 cents is reasonable that the rate of 34 cents is an unreasonable minimum rate; that the two rates contrasted are discriminatory as against Des Moines and unduly preferential to Davenport. These particular examples are only typical of the entire situation which the Commission's decision brings about. We respectfully contend that no administrative body of government has a right to produce such an unlawful situation; and especially is this true when in its finding and orders it specifically calls

attention to the violation of the Interstate Commerce Act. The disparity in these rates between these typical destinations cannot be cured by graduating the rates from one destination to another because that particular treatment would only shift the unlawful prejudice to points beyond. We respectfully contend that a court of equity cannot condone an apparent and admitted violation of the very act under which the Interstate Commerce Commission functions. Therefore, the decision of the Commission which admits of the situation necessarily violates existing law and is unlawful.

The decision and order of the Interstate Commerce Commission approved of rates from New Orleans to Jonesboro, Arkansas, as typical, of 34 cents per 100 pounds, 27½ per cent of the applicable first-class rate (R. 54). The rate on the same commodity from New Orleans to St. Louis approved by the Commission in its decision is 32 cents. St. Louis is a more distant point and therefore Jonesboro is intermediate to St. Louis by direct routes. Here you have a definite and direct violation of the Fourth Section as the rail lines in this proceeding do not ask for or request Fourth Section relief.

The Illinois Central Railroad presents an affidavit to the effect that this situation is protected by Fourth Section order No. 7542 (R. 161). The reading of this particular order makes it apparent that said order applied only to rates in effect in the month of November, 1925, and was not intended to apply to any future rate. This order was,

therefore, only intended to protect the rate situation at the time the order was issued.

THE DENIAL OF APPELLANT'S MOTION FOR REHEARING AND REARGUMENT OF THE COMMISSION'S DECISION AND ORDERS IN I. & S. 3814 WAS A DENIAL OF A RIGHT GUARANTEED TO THIS APPELLANT.

The petition alleges and the record discloses the fact that appellant prepared and forwarded, on July 25, 1933, to the Interstate Commerce Commission a motion for rehearing and reargument in connection with its Docket I. & S. 3814. There is no controversy raised, but that the motion alleged changed conditions that had resulted during the period from the hearing of said record up to the release of the Commission's decision on July 17, 1933, and that these changed conditions were exactly presented in said motion (R. 143-151). The changed conditions were:

1. Depression.
2. National Industrial Recovery Act.
3. Competition.
4. Regulation.
5. Clarification of the record.

This motion was denied by the Commission under date of August 3, 1933 (R. 143). Appellant contends that the denial of this motion was a denial of a right guaranteed by law, and for its authority cites the case of A. T. & S. F. Railway Co. v. United States, 284 U. S. 248. Appellees

rely upon the decision of this Court in United States v. Northern Pacific Railway Co., 288 U. S. 490. The answers of the appellees do not allege that plaintiff's motion did not specifically and definitely set forth changed conditions. Their answer denies that the matters alleged in said petition were true. We respectfully urge that the motion was in proper form, contained proper and sufficient allegations and that the decision of this Court in the Santa Fe case is controlling. In the Northern Pacific case, supra, this Court gave slight consideration to the allegation of changed conditions and specifically found that appellees were guilty of laches in connection with the filing of said report, and specifically stated:

> "Though the order substantially reduced the carriers' revenue, we do not consider the merits of the application for rehearing as we think carriers' lack of diligence in bringing the matter to the Commission's attention deprive them of any equity complained of by refusal of their petition."

In the Northern Pacific case the rail lines delayed the filing of said motion alleging changed conditions from January 15, 1930, to February 3, 1932.

In the foregoing portion of this brief appellant has attempted to present the matters which were considered by the three-judge court in rendering its final decree. By

reason of the fact that appellees have heretofore presented certain propositions with reference to the matters here in issue, and since the Court has reduced the time within which briefs are to be filed, we deem it proper to give consideration to these matters at this time.

PETITIONER HAS A LEGAL INTEREST AND RIGHT.

Section 500 of the Transportation Act of 1920 provides that it is declared to be the policy of Congress to "promote, encourage and develop water transportation, service and facilities in connection with the commerce of the United States." This particular enactment expresses the intention of Congress and is, therefore, the law. It expresses a mandate intended to promote the public welfare and to be in the public interest and, therefore, establishes a right in the intermediary through which this purpose is to be accomplished. Appellant has developed water transportation, service and facilities in connection with the commerce of the United States, and such a venture is to be protected in accordance with the mandate of said enactment. This gives a definite right and interest in appellant to seek redress if any administrative body of government fails to give effect to this enactment.

The further statement in said enactment that it is the policy of Congress "to foster and preserve in full vigor

both rail and water transportation" indicates that this particular right of these transportation facilities and operations shall not be committed to one or the other, but that both have a right to the enforcement of this particular enactment.

By virtue of Sections 1 and 2 of the Sherman Antitrust Act, Congress, by a mandate, has declared that every contract or combination in restraint of trade or commerce among the several states is unlawful, and section 2 provides that any person who monopolizes or attempts to monopolize any part of the trade or commerce among the several states is guilty of an unlawful act. These particular enactments have heretofore been recognized by the Commission as matters which they must consider in determining matters within their jurisdiction.

We respectfully contend that this particular enactment gives to appellant a definite and positive right and that it may protect this right when any decision or determination by a federal agency has failed to give consideration to these particular enactments. This is especially true in the instant proceeding. Here the Commission in its decision admits that the rates proposed or authorized will result in a "staggering blow" to water transportation, and thus, by positive inference, admits that they will tend to produce a monopoly in rail lines.

Appellees have relied upon certain cases as supporting their contention that appellant has no interest sufficient to maintain this suit. Sprunt & Sons v. United States, 281

U. S. 249, was the decision principally relied upon. A consideration of this decision, and of the other authorities advanced by counsel will, we submit, show that they have no application to the case at bar.

In the Sprunt case proceedings were brought before the Commission by certain competitors of Sprunt to compel the railways to cease and desist from according to Sprunt so-called domestic rates on cotton shipped to his compressing plant. It was alleged that the domestic rates as applied to Sprunt were unduly preferential. The Commission so found, and prescribed certain new rates in substitution for the prior rates. It was held that Sprunt had no interest sufficient to maintain such an action.

> "**The appellants contend that there is no basis for the Commission's finding of undue prejudice and preference.** We are of opinion that appellants have no standing, in their own right, to make this attack. In so far as the order directs elimination of the rate differential previously existing, it worsened the economic position of the appellants. It deprived them of an advantage over other competitors. * * * In the case at bar the appellants have no independent right which is violated by the order to cease and desist. **They are entitled as shippers only to reasonable service at reasonable rates and without unjust discrimination.**"

The first and last sentences above quoted furnish the key to this decision. The plaintiff's sole contention was that the rate which he had formerly enjoyed was not un-

duly preferential to him; he did not show, and he did not offer to show, that the rate prescribed by the Commission was in any way unduly prejudicial to him. Even granting that the former rate was not unduly preferential to the plaintiff, it did not follow that the existing rate was unduly prejudicial to him. Unless it was, no legal right had been infringed and no legal damage had been suffered. His only legal right was the right to a rate not unduly prejudicial, and he did not offer to show any infringement of that right.

The position of appellant is precisely the opposite. It alleges and shows that the existing rates violate its legal right, granted it by section 500, to continue in existence as a water carrier. There is nothing in the Sprunt case which could be construed as impairing its standing to bring this suit; on the contrary, we submit, a reading of that case serves rather to throw into relief the essential contrast between the two situations, and to make even more clear the legal interest of appellant to maintain this suit.

So for Edward Hines etc. Co. v. United States, 263 U. S. 143. The principles involved in that case were similar to those in Sprunt v. United States. A proceeding was brought before the Commission by certain jobbers of lumber to compel the railways to cease and desist from collecting certain penalty charges for the detention of freight cars. It was the custom of the jobbers, who in general did not own lumber yards, to use freight cars for storage pur-

poses pending final sale of the lumber. The Commission found that the charges were unduly prejudicial and granted the relief sought. The plaintiff company, which was not subject to penalty charges, since it maintained its own yards, and which desired a continuation of the charges since they were a handicap to its competitors, brought suit to set aside the order of the Commission. It was held, as in the Sprunt case, that no legal right of the plaintiff had been invaded, and hence that the plaintiff had no legal interest sufficient to maintain the suit.

> "Cancellation of a charge by which plaintiffs' rivals in business have been relieved of the handicap theretofore imposed may conceivably have subjected plaintiffs to such losses as are incident to more effective competition. **But plaintiffs have no absolute right to require carriers to impose penalty charges.**"

As in the Sprunt case the plaintiff here failed to show that the **absence of penalty charges** was unduly prejudicial to it. If they were not, even assuming that a continuation of the penalty charges would not have been unduly preferential to the plaintiff, it had not been damaged. The comments made with reference to Sprunt v. United States have equal application here.

There is one further matter which should be considered in connection with these two cases. Appellees appear to have relied upon a certain similarity between these cases and the case at bar—a similarity, which, upon consideration is, we submit, of an entirely superficial nature. In

the Hines case it was held that plaintiff had suffered no legal damage although, as the Court said, it had been subjected "to such losses as are incident to more effective competition." A similar statement was made in the Sprunt case.

From these two statements, appellees, leaving entirely aside the basic reasons why legal damage was found not to exist in these cases, apparently have drawn the inference that the loss sustained by appellant cannot be considered as legal damage since it is a loss incurred, in a sense, because of more effective competition. Appellant readily concedes that the removal of a competitive advantage, or even the diminution of a competitive equality, to which a party has no legal right, does not give that party any standing in court. No legal right, in such a case, has been invaded, and therefore no legal damage has been suffered. That, however, is very different from appellant's situation. It has suffered legal damage by virtue of the invasion of a legal right to continued existence. That fact is not altered by the circumstance that this damage takes the form of a loss of traffic to competing rail lines. The essential question, in considering whether legal damage has been suffered, is not, we believe, whether the loss complained of has occurred through a disturbance of competitive relations, but is whether the loss, from whatever source it came, can be considered as an injury to a legal right. The Hines and Sprunt cases, we submit, did not hold that there was no legal damage **because** of the

fact that loss had occurred through more effective competition; they held that, on the facts presented, no legal damage had been suffered **in spite of** the fact that loss undoubtedly had occurred through more effective competition. They held, in other words, that loss sustained through more effective competition, in and of itself and without more, does not necessarily constitute legal damage. That is very different from holding that because the loss had there occurred through more effective competition it could not be considered as legal damage.

The Chicago Junction case, discussed below, serves as a clear illustration of the point. There the plaintiff's damage undoubtedly occurred through the more effective competition made possible to the New York Central by its ownership of the terminals in dispute, yet it was held by this Court that the plaintiff railroads had been subjected to legal damage, and therefore that they could maintain their suit.

Counsel for appellees have relied upon Atchison etc. Railroad Company against United States, 279 U. S. 768, as determinative of the proposition that appellant has suffered no legal damage and, therefore, cannot maintain its suit. That case merely held that the plaintiff railroad had no vested right to move southbound grain traffic from Kansas City merely because it had brought the grain into Kansas City previously from Western points of origin. Appellant does not contend that it has any vested right to the movement of any particular traffic from a point to

which it has previously carried such traffic, but contends that it does have a right to continue in existence.

Appellees have also relied upon Pennsylvania Railroad Company v. United States, 40 F. (2d) 921, and Indian Valley Railroad v. United States, 52 F. (2d) 485. The facts and holdings of these two cases are so closely similar that a discussion of the former will be sufficient to indicate the nature of both. A certain railway applied to the Interstate Commerce Commission for a certificate of public convenience and necessity authorizing it to construct a branch in the territory then served alone by the plaintiff railway. By an order of the Commission the certificate was granted and the plaintiff sought to annul this order. It was held that the plaintiff had no standing in court, on the ground that it had suffered no legal damage, since it had no legal right to be the sole carrier serving this territory. The Court said that there was nothing, either in the unwritten or the written law, implying that such a right in any carrier existed, but that on the other hand

> "* * * the written law negatives such a right by providing expressly for the invasion by one carrier into a territory exclusively served by another on a showing of convenience and necessity of more transportation service * * *."

In the case at bar the contrary is true. There is no denial in the law, written or unwritten, of a legal right in appellant to continued existence; on the contrary, there

is a positive assertion of that right in the statutes elsewhere discussed.

There is a further distinction. In the cases cited by counsel the plaintiff sought to maintain its position as sole carrier in a given territory; in the case at bar appellant seeks only to maintain its existence as one of many competing carriers. It does not seek to obtain a monopoly; it seeks only to prevent a monopoly.

THE THREE-JUDGE COURT HAD JURISDICTION TO ENJOIN, SET ASIDE AND ANNUL THE ORDERS HERE COMPLAINED OF.

It has been urged that the orders of the Commission here complained of are negative in character and, therefore, that it is not within the jurisdiction of this Court to set them aside. Such an argument may at first glance appear to find support in Procter & Gamble v. United States, 225 U. S. 282, and certain other decisions of this Court cited by appellees, but it is submitted that on closer examination these cases, qualified as they have been by later decisions, clearly do not control the case here presented.

In Procter & Gamble Co. v. United States, relief was sought by the plaintiff shipper before the Commission from certain demurrage charges alleged to have been in violation of the Interstate Commerce Act. The Commission, within its province and jurisdiction, found the charges lawful and denied relief. Suit was brought in the Commerce Court to annul the Commission's order and

enjoin the railroads from collecting the charges complained of; the Court dismissed the bill on the merits. On appeal it was held that the only orders of the Commission which the Commerce Court had jurisdiction to enjoin were those affirmative in nature; that this order was negative and therefore that the bill should have been dismissed for want of jurisdiction. In reaching this conclusion Mr. Chief Justice White, who wrote the opinion of the Court, relied principally upon two lines of reasoning: First, that upon the construction of the phraseology of the statute authorizing suits to enjoin orders of the Commission only such orders as were capable of affirmative enforcement were subject to be enjoined and, second, that it would be impolitic and contrary to the spirit of the Interstate Commerce Act to allow

> "* * * courts as an original question, without previous affirmative action by the Commission, to deal with what might be termed in a broad sense the administrative features of the act to regulate commerce by determining as an original question that there had been a compliance or noncompliance with the provisions of the act" (page 297).

It appears from later decisions of this Court, presently to be discussed, that the first of these reasons has been abandoned to such an extent that it no longer applies to a situation such as is here presented; and we will attempt to show in a subsequent portion of this brief that the second reason also has no application to the case at bar.

Two years after the Procter & Gamble decision had been handed down this Court per Mr. Chief Justice White, decided the Intermountain Rate Cases, 234 U. S. 476. These were suits brought to enjoin enforcement of an order of the Commission under the following circumstances. Immediately subsequent to the amendment of the fourth section of the Interstate Commerce Act in 1910, certain railways applied to the Commission for fourth section relief to continue in effect rates then operative which would become unlawful by virtue of the amendment unless the relief sought were granted. After a hearing the Commission entered an order dividing the territory under consideration into zones, denying application for relief as to certain of these zones and as to certain other of the zones authorizing the railways to establish rates lower to terminal points than to intermediate points, provided that the intermediate rates should not exceed the terminal rates by certain designated proportions. The railways brought suit in the Commerce Court, praying, among other things, that the order of the Commission, in so far as it denied relief, be enjoined. It was urged by the United States that the order was negative and, therefore, not reviewable. The lower court granted an injunction. On appeal this was reversed on the ground that the Commission's order was sustained by the facts on which it was based. This Court, however, expressly held that the order was in its nature subject to injunction if erroneous, on the theory

that when relief under the law and the facts should be granted, its denial is, in substance, an affirmative order:

> "* * * the right to petition the Commission conferred by the statute is positive, and while the refusal to grant it may be in one sense negative, in another and broader view it is affirmative, since it refuses that which the statute in affirmative terms declares shall be granted if only the conditions which the statute provides are found to exist" (page 490).

It might be urged that the last part of the Commission's order providing that rates should not exceed certain specified proportions rendered the order affirmative as against the railways and thus explains the decision. The answer to such a contention is found in the history of a contemporaneous case.

Shortly after the Commerce Court had rendered its decision in the Intermountain Rate Cases and pending any decision on these cases by this Court, to which they had been appealed, a similar application to the Commission for fourth section relief was made by the Louisville & N. R. Company. Relief was denied by the Commission, the application being refused without qualification. Petition for an injunction of the Commission's order was filed before the Commerce Court and the bill was dismissed on the ground that the order of the Commission was negative, and hence, that the Court lacked jurisdiction. The Commerce Court, which previously had taken jurisdiction in

the Intermountain Rate Cases, distinguished the Commission's order in the latter cases from the order then before it, on the ground that the order in the Intermountain Rate Cases was affirmative in the respect above noticed, whereas there was no affirmative element in the Commission's order then before it (Louisville & N. R. Company v. United States, 207 Fed. 591). An appeal was taken from this ruling and, pending appeal, this Court rendered its decision in the Intermountain Rate Cases. It evidently was considered that this decision covered the question of jurisdiction in the Louisville & N. R. case, since upon confession of error the latter case was remanded to the District Court, the Commerce Court in the meanwhile having been abolished (Louisville & N. R. Company v. United States, 238 U. S. 642). The District Court took jurisdiction but denied relief on the merits (225 Fed. 571), and the case was affirmed by this Court on appeal (245 U. S. 463).

These two cases definitely hold, then, that an order of the Commission denying relief is subject to injunction. Such a holding, we urge, overrules the Procter & Gamble case in respect to the first ground of that decision. Whether or not an order of the Commission is subject to affirmative enforcement was the criterion prescribed by the Procter & Gamble case to determine whether such order could be enjoined. Clearly the order of the Commission involved in Louisville & N. R. Company v. United States was not such an order and yet this Court held that it was subject to injunction.

In a line of cases subsequent to the Intermountain Rate Cases and continuing to the last term of this Court the Procter & Gamble case has been further modified.

One of the most significant of this line of decisions is the Chicago Junction Case, 264 U. S. 258. In this case the New York Central Railroad applied for and obtained an order of the Commission authorizing it to purchase the C. R. & I. Railroad and to lease the Chicago Junction Railway for ninety-nine years. Under the Transportation Act of 1920 it was necessary to obtain this authorization in order for the transactions to be legal. The order was opposed before the Commission by five competing railways but was granted, and immediately thereafter one railway was purchased and the other leased. The competing railways then brought suit to have the order annulled, the sale and the lease set aside, and for an injunction. The Court granted relief. On the question of whether or not the Commission's order was negative and therefore not justiciable, it said:

> "Nor would the further fact that the order is permissive preclude review if by that term is meant an order which, in contradistinction to one compelling performance, authorizes a carrier to do some act otherwise prohibited" (page 263).

It will be observed, then, not only that orders denying affirmative relief but also orders granting permissive relief may be enjoined. The enjoining of these orders is

clearly contrary to the standard originally prescribed by the Procter & Gamble case.

It is submitted that the Chicago Junction Case is conclusively determinative of the present case. In the former an order granting permission to do something which otherwise would have been unlawful was annulled. In the present case appellant seeks the annulment of an order permitting the railways to establish certain rates which otherwise, because of the Commission's prior suspension of these rates, could not legally be established, and which rates by reason of the invalid order of the Commission are in and of themselves unlawful. The facts in both cases, as far as the question under consideration is concerned, are identical, and the Chicago Junction Case would seem, therefore, to be controlling.

Three months after its decision in the Chicago Junction Case this Court handed down its opinion in United States v. New River Co., 265 U. S. 533, which, also, it is submitted, exactly covers the present situation and answers any contention that the courts lack power to annul and set aside the order complained of by appellant. In that case an injunction restraining enforcement of an order of the Commission was granted under the following circumstances: Prior to 1921 the railways had in effect "rule 4" in regard to the relative distribution of cars as between joint mines (mines located on more than one carrier line) and local mines (those located on one line only). Rule 4 permitted a joint mine, in making application for daily car

service from the two carriers on whose lines it was situated, to apply to either carrier for any proportion of the cars to which it was entitled on the basis of the daily production rating of the mine, but the combined application to both carriers could not exceed 100 per cent of its daily rating. The so-called 150 per cent rule, however, permitted a joint mine to apply for 75 per cent of its daily rating from both carriers, subject to the limitation that it was not entitled to receive in the aggregate more than its daily rating. The latter rule was more desirable to owners of joint mines since, in case of a car shortage, each mine was given only a ratable proportion of the cars applied for. In 1921 certain owners of joint mines filed complaints with the Commission attacking rule 4 as unduly prejudicial to the joint mines on the ground that it did not give such mines the full advantage of their location on more than one railroad. Division 5 of the Commission found that rule 4 was unduly prejudicial and that the so-called 150 per cent rule advocated by the owners of joint mines was not prejudicial. No formal order was entered, the Commission stating, however:

> "We have not required that car-service rules be filed as tariff schedules. We will not, in this proceeding, direct that the rules which we herein find to be reasonable be so filed. We shall expect, however, that defendants will promptly amend their car-service rules so as to conform with our findings, and evidence same by filing copies thereof with us."

The defendant carriers amended their rules to conform to the findings of this report and put in force the 150 per cent rule. Later, on petition of owners of local mines, the case was reopened by the Commission en banc, which reversed the finding of Division 5 and found that rule 4 was neither unreasonable nor unduly prejudicial, and dismissed the original complaint of the owners of joint mines.

Thereupon the latter brought suit against the railways, the United States and the Commission "to enjoin the carriers from applying rule 4 and to set aside the order of the Commission." The lower court set aside the Commission's order and enjoined the Commission, the United States and the railways "from restricting the rights of appellees (joint mine owners) in accordance with the order and rule, or through any other order or rule to the same effect."

On appeal this decision was reversed on the ground that rule 4 was not unduly prejudicial. However, this Court first held that the lower court had jurisdiction to enjoin the order.

> "The mere fact that the order of the Commission dismisses the complaint of shippers against rule 4 does not make it a negative order. That rule, promulgated during federal control, was continued in effect upon the recommendation of the Commission until it decided, June 21, 1921, that the rule was unduly prejudicial to joint mines and unduly preferential of local mines, and that the carriers should distribute cars to joint mines on the basis of the 150 per cent rule. The

> Commission refrained from making an order that the rule be filed as a tariff schedule, but announced that it expected the carriers promptly to amend their car-service rules to conform with its findings. Accordingly, the carrier ceased to apply rule 4, and applied the 150 per cent rule in its place. When the case was reopened before the Commission, * * * the Commission reversed its former findings and decided in favor of rule 4, and dismissed the complaints assailing that rule. The order expressly includes the findings and conclusions stated in the report. **It is not merely negative. Clearly, the order permits and authorizes the carriers to apply rule 4. If that rule is illegal, as alleged, such permission and authority will not sustain it, and suit will lie to set it aside** (Chicago Junction case, supra). Plainly, it was the intention and purpose of the Commission that rule 4 should be applied in place of the 150 per cent rule. The effect of the order is to grant the relief sought by the operators of local mines. We hold that the District Court had jurisdiction'' (page 541).

This case, in accordance with the Chicago Junction case, holds that an order authorizing a change in the status quo, even though it be merely permissive in nature, is substantially affirmative and, therefore, subject to injunction. The Commission's orders complained of in the present case, as indicated above, are precisely of this nature. To paraphrase the latter portion of the language above quoted, the effect of the Commission's orders in the present case is to grant the relief sought by the railways from the Commission's order suspending the effectiveness of the

new tariffs filed by them. If it be urged that a suspension order is not a final order, the obvious answer lies in the fact that, in U. S. v. New River Company, supra, no formal order of any nature was entered prior to the order dismissing the complaint of the joint mine owners. In both cases the status quo was temporarily altered by the Commission's action and then realtered by a formal order denying the relief originally asked for. It is earnestly contended by appellant that if the Commission's order in the above case were affirmative in substance, although negative in form (and this Court held that it was), it must follow that the order of the Commission which appellant here seeks to have set aside is similarly affirmative in substance and, therefore, is an order reviewable before the courts.

A recent case holding that even though an order be negative in form if it be affirmative in substance it may be enjoined in a proceeding such as this, is Alton Railroad Company v. United States, 287 U. S. 229. The Alton Railroad and certain of its connecting carriers had agreed upon a division of "reshipping rates." The connecting carriers became dissatisfied with this division and, taking advantage of their strategic position as collectors of the rates at points of destination, reduced the amount paid to the Alton as its division. The Alton sought relief before the Interstate Commerce Commission which, after hearing, found that the new divisions put into effect by the connecting carriers were not unreasonable and refused to grant relief. In the same proceeding the Commission

found that the division of certain other rates accorded the Alton were too low and ordered them increased. The Alton filed suit to set aside the former portion of the Commission's order denying relief. The lower court dismissed the bill on the ground that the Commission's order was negative in character and, therefore, not within its jurisdiction. On appeal this Court, per Mr. Justice Brandeis, reversed this holding. On the question of jurisdiction the Court said, at page 237:

> "The jurisdiction of courts to review orders of the Commission is not dependent upon the form in which the order is couched. If the eastern carriers had applied to the Commission for a change in the divisions fixed by agreement, and the commission had authorized divisions precisely like those which they are now imposing upon the Alton by their unauthorized action, the order would have been affirmative in form and would obviously have been subject to attack by the Alton in a suit in the federal court. By their unauthorized action the connecting carriers forced the Alton to become the moving party before the Commission, with the result that the Commission's approval of the divisions effected by them was expressed in the form of a refusal to interfere. This result of the alignment of parties does not endow the Commission's order with immunity from judicial review."

In the present case the carriers have, by filing illegally low rates, forced appellant as its only remedy to apply for relief before the Commission. A denial of the relief there sought, according to Mr. Justice Brandeis, although it may

be negative in form, is clearly an order affirmative in substance and, therefore, subject to be enjoined by this Court.

From the four cases above discussed it is clear, we believe, that the standard prescribed by the Procter & Gamble case as to whether an order is subject to injunction has definitely been abandoned. None of the orders held subject to injunction by this Court in the four cases discussed was capable of affirmative enforcement. Therefore, even if the orders here complained of be construed as merely permissive in nature, that fact does not preclude appellant from injunctive relief. Moreover, from the above cases it is also clear that the fact that the Commission's orders here complained of are in some respects orders dismissing a prayer for affirmative relief does not prevent them from being annulled.

It has been stated above that the second ground relied upon by the Court in Procter & Gamble v. United States has no application to the present situation. It will be recalled that the relief sought in that case was against the alleged unreasonableness of certain demurrage charges sought to be collected by the railroad. Whether or not they were unreasonable depended upon a proper construction of the Interstate Commerce Act alone. Mr. Chief Justice White, in outlining the second basis for his decision, stated that it was not within the power of the courts, in the absence of action by the Commission, to determine whether the terms of the act had been complied with.

"* * * it was never considered that there was

> power in the courts as an original question, without previous affirmative action by the Commission, to deal with what might be termed in a broad sense the administrative features of the act to regulate commerce by determining as an original question that there had been a compliance or noncompliance with the provisions of the act" (page 297).

The legality of the action of the Commission in the present case does not depend solely upon whether its construction of the Interstate Commerce Act was proper. The matters here complained of are far broader in scope than matters the legality of which is governed solely by the Interstate Commerce Act, and the enforcement of which is entrusted to the Commission as a mere administrative function of that body. The rates sanctioned by the orders here complained of violate not only the Interstate Commerce Act but the Antitrust Laws and the declared policy of Congress, as set forth in Section 500 of the Transportation Act of 1920, that both rail and water transportation shall be fostered and preserved in full vigor. It is clear from the following language in Procter & Gamble v. United States that such a situation was not there contemplated:

> "The latter case (Texas & P. R. Co. v. Abilene Cotton Oil Co., 204 U. S. 426) especially will serve to point out that where the power of original action by a court, without previous action of the Commission, was insisted upon, it was based upon the conception that the particular subject matter as to which such power was asserted was, by the express terms of the act to reg-

> ulate commerce, not embraced within the subject primarily confined by the act exclusively to the administrative authority of the Commission" (page 297).

In the present case appellant is not seeking alone to prevent an improper failure to enforce the administrative provisions of the Interstate Commerce Act but is seeking also to prevent a violation of two other acts of Congress, both of which are separate from, and independent of, the Interstate Commerce Act. Clearly, the relief here sought is not barried either by the letter or the spirit of the decision in Procter & Gamble v. United States.

Mr. Chief Justice White, in the Intermountain Rate Cases, made the following statement, which directly supports the contention here advanced:

> "It is, of course, true * * * that findings of fact made by the Commission within the **scope of its administrative duties must be accepted in case of judicial review**, but that doctrine, as was also pointed out, does not relieve the courts in a proper case from determining whether the Constitution has been violated or whether statutory powers conferred have been transcended, or have been exercised in such an **arbitrary** way as to amount to the exertion of authority not given—doctrines which but express the elementary principle that an investiture of a public body with discretion does not imply **the right to abuse**, but, on the contrary, carries with it as a necessary incident the command that the limits of a sound discretion be not transcended; which, by necessary implication, car-

ries with it the existence of judicial power to **correct wrongs done by such excess**'' (page 490).

An extended search by appellant has disclosed no cases in which a court denied injunctive relief against an order, the propriety of which depended upon something more than the terms of the Interstate Commerce Act and the operation of which invaded a substantial right of the plaintiff. Appellees have relied upon Manufacturers Railway v. United States, 246 U. S. 457. In this case application to the Commission was made by the plaintiff railway to compel certain trunk lines to establish with it both joint rates and divisions thereof. The Commission ordered the trunk lines to establish joint rates but refused to order any specific divisions, since it preferred to have the carriers reach their own divisions by agreement, if possible. The plaintiff brought suit to enjoin the Commission's order. It was held that that portion of the order which refused to establish divisions was negative, since it denied relief, and the case was dismissed for want of jurisdiction. It seems clear that the question of whether or not divisions should have been ordered by the Commission was solely one of administrative discretion and depended for its determination on a proper interpretation of the Interstate Commerce Act alone. The refusal of this Court to interfere with an order denying relief in such a situation is in entire consonance with the second line of reasoning adopted in the Procter & Gamble case, and this line of

reasoning, as above indicated, has no application to the case at bar.

To summarize: The holding of Procter & Gamble v. United States to the effect that an order to be subject to injunction must be an order capable of affirmative enforcement, seems definitely to have been abandoned. The second line of reasoning advanced in the Procter & Gamble case, to the effect that an order of the Commission may not be enjoined when it is negative in form and deals with subjects solely within the jurisdiction of the Interstate Commerce Commission, and when its propriety depends upon a proper construction of administrative portions of the Interstate Commerce Act alone, and not upon questions of law aside from that act, has no application to the case at bar, since the order here complained of violates not only the Interstate Commerce Act but also the Anti-trust Laws and Section 500 of the Transportation Act. The Court is not here faced with a question of the reasonableness of demurrage charges or rate divisions—questions depending for their determination solely upon a proper construction of the act. Whether or not the order here complained of should have been entered by the Commission involves questions of policy as broad in scope as the questions involved in the Intermountain Rate Cases. The annulment of such an order, therefore, does not amount to a usurpation by the courts of functions entrusted solely to the Commission.

The cases above discussed indicate that if a definite

right is invaded by a so-called order of the Commission, and if an irreparable injury results therefrom, the power of equity to grant relief cannot be limited and confined by virtue of the mere form of the order complained of. The Interstate Commerce Commission may determine rights under the Interstate Commerce Act, and orders within its jurisdiction, alone, may be subject to the test prescribed by the Procter & Gamble case, yet equity will not stay its hand when a definite right, which limits the Commission in the exercise of its powers, has been denied. Not only is intervention by the courts entirely proper, but it is imperative if irreparable injury to appellant is to be prevented, and if two of the most important policies of Congress—the fostering of water transportation and the prevention of monopolies—are to be upheld. Therefore, both upon precedent and upon principle, appellant submits that it is entitled to the relief which it seeks.

THE MATTERS INVOLVED IN THIS APPEAL ARE NOT MOOT.

It has been alleged in the answer of appellees (interveners) that the question here involved is moot, since the rates authorized by the order complained of have gone into effect. Such a contention necessarily would be based upon the theory that whatever disposition is made of this cause, no actual relief would be obtained by appellant.

We first discuss this matter giving no consideration to

the fact that certain rail carriers have entered their appearance in this cause.

The Commission could (and upon an annulment of its decision and orders, its docket I. & S. 3814, would be under a duty to) require rail carriers to take out the rates which became effective alone by virtue of its illegal decision and orders.

> "Whenever after full hearing, upon a complaint made * * * or after full hearing under an order for investigation and a hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any * * * rate * * * is or will be unjust or unreasonable * * * the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable * * * rate * * * to be thereafter observed in such case * * *" (Act of Cong. Feb. 4, 1887, c. 104, § 15, 24 Stat. 384 as amended; U. S. Code Title 28, § 15 [1]).

The Commission is empowered by this section to effect, upon its own initiative, a change in rates, even though no proceeding relative to such rates is then pending before it, and even though no complaint respecting the rates is then lodged with it. Upon an annulment of the order here complained of, it would be the duty of the Commission to exercise this initiative. The question, therefore, is not moot, since effective relief to your petitioner would result from an annulment of the Commission's orders.

Even assuming, however, that the Commission would have no duty and no power upon its own initiative to take action in regard to these rates, the question still is not moot. Upon annulment of the present orders, appellant, or anyone similarly situated, could file a complaint before the Commission, and the Commission, in acting upon said complaint, would be bound by the principles announced by this Court in its order of annulment. It may be urged, because under this theory a separate proceeding would have to be brought by your petitioner before complete relief could be obtained, that the questions involved in the present proceeding are, therefore, moot. The contrary has been held. In Technical Radio Laboratory v. Federal Radio Commission, 36 Fed. (2d) 111, the plaintiff made application for a renewal of its radio license. Under the practice before the Radio Commission, the term of such renewals was three months. The Commission refused the plaintiff's application. The plaintiff appealed to the Federal Court and, pending disposition of the case, the three months period elapsed. It was contended, therefore, that the case had become moot. The Court, however, overruled this contention:

> "It is argued on behalf of the Commission that this appeal presents a moot question because of the fact that the Commission may not issue a license for a longer period than three months; and that, if the Commission had issued the renewal license which appellant applied for, such license would long since have

expired according to its own terms. It is argued that, since the period for which the license might have been issued has expired, this appeal has become moot, and should be dismissed. We do not agree with this contention. Such an interpretation of the act would practically nullify the right of appeal granted by Congress in such cases, for it is rarely possible for a station to secure a decision upon such an appeal within three months after the right of appeal accrues. This fact was of course well known to Congress when the statute was enacted. Moreover the relief sought by an applicant for renewal is not limited to the issue of a license for three months only, but includes a continuing right to apply thereafter at proper times for successive renewals thereof. That statutory appeal accordingly contemplates the restoration to the appellant, if his claim be sustained, of the continuing right to make such application to the Commission as he would have enjoyed had his application first been allowed. We feel justified, therefore, in entertaining the appeal'' (p. 113).

It will be observed that in this case no complete relief could result directly from the Court's order; it was necessary, before the plaintiff could benefit by the Court's action, for the plaintiff to institute a new proceeding before the Commission. Yet the question was held not be moot. The Court rendered its decision so that when the plaintiff did appear again before the Commission he could do so fortified by a judicial decision as to his rights.

A recent decision by this Court has been urged by the defendants in respect to the question here involved

(Sprunt v. United States, 281 U. S. 249). In this case Sprunt had been accorded by the railways so-called "uptown" rates on shipments to his compressing plant. These rates were lower than the so-called "ship-side" rates. A proceeding was brought before the Commission by certain competitors of Sprunt, and, pursuant to their complaint, the Commission, within its jurisdiction, ordered the railways to cease and desist from according to Sprunt the uptown rates, because these rates were unduly preferential. The railways and Sprunt brought suit before a three-judge court to annul this order of the Commission. The suit was dismissed on the merits. Thereupon the railways put into effect ship-side rates to Sprunt's plant. Sprunt alone appealed from the ruling of the Court. It was held, since the ship-side rates had gone into effect, that the question had become moot.

> "A judgment in appellants' favor would be futile. It would not restore the appellants to the advantage previously enjoyed. If the Commission's order is set aside the carriers would still be free to continue to equalize the rates; and for aught that appears would continue to do so."

This decision, it is submitted, is distinguishable from the case at bar. Sprunt was not entitled to an unlawful preference. If this Court in Sprunt v. The United States had ruled upon the Commission's order it would have passed only upon the question of whether or not the former rate was unduly preferential to the plaintiff. An annulment

of the order would merely have been a holding that the uptown rate, which the plaintiff sought to reinstate, was not unduly preferential. It would not have been a holding that the existing rate (the ship-side rate) was unduly prejudicial to the plaintiff. Therefore, a decision would not have helped the plaintiff's position in any respect. It would not, as in the case at bar, have imposed any duty upon the Commission to reopen the case and substitute a lawful rate for the rate then in effect, since there would have been no finding that the rate then in effect was unduly prejudicial. Nor, for the same reasons, would it have helped the plaintiff in any later proceeding he might have instituted before the Commission, since there would have been no adjudication by the Court of the illegality of the rate complained of. In the case at bar the contrary is true. The distinction between the two cases, we respectfully submit, is essential.

In the foregoing, we have discussed this matter as a general proposition having application to the rail carriers who have not entered an appearance. However, various rail carriers have entered their appearance in this proceeding. They have thus submitted themselves to the jurisdiction of the Court and may be enjoined from assessing, charging or collecting the particular rates here brought in issue. Therefore, this question is not moot, for the reason that the Court has jurisdiction of these parties and they may, by affirmative order, be required to cease and desist from applying the rates in controversy.

A further circumstance should be considered. Prior to the date upon which the rates authorized by the Commission's order were to take effect, the Commission was advised by appellant that it was to file this suit, and the Commission was definitely requested to postpone the effective date of the rates until an adjudication could be had before the three-judge court (R. 142). The Commission refused to do so. If the Commission had granted this request, no possible contention could have been made that the question here presented is moot. Assuming that the arguments above advanced are untenable and that the question has become moot, it became moot solely because of the deliberate refusal of the Commission to grant the requested postponement. It is inconceivable that a court of equity would hold itself powerless to grant relief in such a situation. It is clear from the following statement by Mr. Justice McKenna in Southern Pacific Terminal Co. v. Interstate Commerce Commission, 219 U. S. 498, that the courts will not allow a defendant thus to foreclose the rights of his adversary, and that if the question becomes moot through any fault of the defendant, a decision nevertheless will be rendered:

> "This Court has said a number of times that it will only decide actual controversies, and if, pending an appeal, something occurs, without any fault of the defendant, which renders it impossible, if our decision should be in favor of the plaintiff, to grant him effectual relief, the appeal will be dismissed" (p. 514).

In this case the Court rendered its decision, in spite of the fact that, in one sense of the word, the question passed upon had become moot. An order had been entered by the Interstate Commerce Commission commanding certain railroads to cease and desist, during a specified period, from a practice allegedly preferential. Suit was brought to enjoin an enforcement of the order. The trial court entertained jurisdiction and dismissed the bill on the merits. It was contended on appeal that since the Commission's order had expired, the case thereby had become moot. This Court, although it affirmed the decree of dismissal, first held that the case was not moot, on the ground that if it were held moot such a decision would enable the Commission, by the use of short-term orders, to defeat any opportunity of review.

> "In the case at bar the order of the Commission may to some extent (the exact extent it is unnecessary to define) be the basis of further proceedings. But there is a broader consideration. The questions involved in the orders of the Interstate Commerce Commission are usually continuing (as are manifestly those in the case at bar), and these considerations ought not to be, as they might be, defeated, by short-term orders, capable of repetition, yet evading review, and at one time the Government, and at another time the carriers, have their rights determined by the Commission without a chance of redress" (p. 515).

In the above case there was no showing that the Commission was cognizant that the period which it had set for

the duration of its order would preclude review. In the case at bar, as stated above, the Commission was fully advised of the situation at the time it refused appellant's requests for a postponement of the effective date of its order. In the present case, therefore, it is even more imperative than it was in the Southern Pacific case that a decision be rendered.

Leaving aside for the moment any question of further proceedings before the Commission, either upon the Commission's initiative or upon a complaint to the Commission by appellant, this case for an additional reason is not moot. The present rates went into effect, if our contention is correct, by virtue solely of an invalid order of the Commission. If the Commission's order is annulled, the rates now in effect clearly will be unlawful. The relief prayed for, therefore, will enable appellant to bring a suit in equity in a federal court against the several railways not now parties, to enjoin them from continuing in effect the rates objected to.

For these reasons, therefore, it is submitted that the matters here presented are in no sense moot, but present a justiciable controversy.

CONCLUSION.

Appellant therefore respectfully requests this Honorable Court to reverse the final decree of the three-judge court and by proper orders to require said court to enter a decree wherein and whereby the decision and orders of the Interstate Commerce Commission, its Docket I. & S. No. 3814, be annulled and set aside and Intervening Rail Lines be enjoined from charging the rates complained of.

Respectfully submitted,

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